

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VOTER REFERENCE FOUNDATION, et al.,

Plaintiff,

VS.

NO. CV 22-00222 JB/KK

Raul Torrez, Attorney General
for the State of New Mexico, et al.,

Defendants.

Transcript of Motion Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on June 14, 2023.

For the Plaintiff: Mr. Eddie Greim; Mr. Matt
Mueller; Mr. Carter Harrison

For the Defendant: Ms. Kelsey Schremmer; Mr. Jeff
Herrera

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1 THE COURT: All right. Good morning
2 everyone. I appreciate everybody making themselves
3 available to me this morning. The Court will call
4 Voter Reference Foundation, LLC versus Raul Torrez,
5 et al., Civil Matter Number 22 CV 0222 JB/KK.

6 If counsel will enter their appearances
7 for the plaintiff.

8 MR. GREIM: Eddie Greim.

9 MR. MUELLER: Matt Mueller.

10 THE COURT: Mr. Greim, Mr. Mueller, good
11 morning to you.

12 And for the defendants?

13 MR. HERRERA: For the defendants, Jeff
14 Herrera. And joining me is Kelsey Schremmer.

15 THE COURT: Mr. Herrera, good morning to
16 you. And Ms. Schremmer, good morning to you.

17 MS. SCHREMMER: Good morning. I apologize
18 for cutting it so close, Judge.

19 THE COURT: All right. Anybody else? I
20 don't see anybody on Zoom or anything.

21 I may have asked this question at the very
22 beginning of the case when we were dealing with the
23 preliminary injunction. On the LLC, did I ask you
24 to file a letter indicating who the principals and
25 members are, and provide the citizenship of each of

1 the principals and members?

2 MR. GREIM: Your Honor, I don't recall.

3 But we can certainly do that. None of these trace
4 back to publicly traded companies or for profits.

5 But if we don't have that in the record, it is long
6 past time to do it, and we will do it right away.

7 THE COURT: Okay. If you would do that.

8 And this is a little different than the disclosures
9 that the federal rules require of corporations. But
10 since it's an LLC, what I'm interested in, if this
11 case breaks down or something into diversity
12 jurisdiction or something, I need to know the
13 principals and members and then all their
14 citizenship.

15 Let me ask a few questions about this
16 case. Maybe I was under a misimpression that when
17 we got the order staying the preliminary injunction
18 that they would follow-up with an opinion. Am I
19 just wrong on that? Is that it? Or is there going
20 to be more coming out?

21 MR. GREIM: Your Honor, we would expect
22 there to be some. But we can only speculate. As I
23 think you mentioned before, you know, we can only
24 guess what the Tenth Circuit is doing or why. But
25 we let them know that we had trial scheduled and

1 summary judgment on all the issues. We didn't ask
2 for an expedited decision. And so it may well be,
3 Your Honor, that they're now waiting for us.

4 THE COURT: What do the defendants -- do
5 you expect any more from the Tenth Circuit, or are
6 they done with their work?

7 MS. SCHREMMER: We're trying to find the
8 stay. I do recall there was some briefing at the
9 Tenth that was concurrent with the summary judgment
10 briefing that we have just completed. And so that
11 has only recently been fully briefed in the last few
12 handful of months.

13 THE COURT: What are y'all briefing up
14 there? The preliminary injunction?

15 MS. SCHREMMER: Yes. And the prior
16 restraint issue that we have not briefed in summary
17 judgment, per this Court's orders.

18 I believe there were some other ancillary
19 issues that both parties had thought were at issue
20 and briefed as well. But our appellate counsel has
21 taken the lead on briefing that. So if I can
22 provide more information, I'll consult with him and
23 certainly get you whatever you need.

24 THE COURT: Well, is that your impression
25 that y'all are continuing to brief stuff at the

1 Tenth?

2 MR. GREIM: No, Your Honor. To my
3 recollection, it's been a quite a while since we
4 filed anything in the Tenth. Mr. Mueller is looking
5 right now. We're a full-service shop. We do
6 appellate, we do everything. In my view, it was
7 limited. We tried to tell the Tenth Circuit that we
8 viewed it as limited. And we tried to tell them
9 that, you know, the amended complaint and all the
10 new theories in the case are proceeding down here.

11 So I mean, we certainly expect them to do
12 something eventually. But it's not like we just
13 finished briefing. It's been a while. And
14 candidly, back when we were last here, if you would
15 have told me that in June we still wouldn't have any
16 decision from them, I would have been a little
17 surprised.

18 MS. SCHREMMER: Your Honor, we have dates.
19 The reply brief was filed in the Tenth Circuit on
20 March 15th, this spring. And supplemental authority
21 was filed on April 19th. And I don't know if that
22 was our filing or theirs. So within this last
23 handful of months is when briefing completed at the
24 Tenth Circuit. And that was the basis for our
25 motion to stay these proceedings entirely until we

1 had a ruling from the Tenth Circuit. And that is
2 where we got the ruling from Your Honor kind of
3 excluding from these proceedings right now the prior
4 restraint issue in anticipation that there would be
5 further instruction from the Tenth.

6 THE COURT: When did their order staying
7 the preliminary injunction come out?

8 MS. SCHREMMER: December 28th of 2022.

9 THE COURT: So the defendants are -- do
10 you disagree with that?

11 MR. GREIM: No.

12 THE COURT: Okay. So there has been
13 briefing going on after they issued the order?

14 MR. GREIM: That's right. I mean, it's
15 kind of -- it's becoming convoluted. But it's
16 briefing on the underlying appeal of the preliminary
17 injunction. And again --

18 THE COURT: So let me make sure I
19 understand, you know, since I don't do appellate
20 work every day like y'all and your office. So there
21 was an appeal of the preliminary injunction, and
22 that was by the State; correct?

23 MS. SCHREMMER: Yes.

24 THE COURT: You didn't appeal anything in
25 it? Okay, so it was just the State. And then, at

1 the same time, did the State file a motion to stay
2 the preliminary injunction? Is that how we got the
3 order?

4 MS. SCHREMMER: Yes.

5 THE COURT: So the preliminary injunction
6 issue is still up there and pending. And I think
7 we're right, we will get something. Okay.

8 Well -- and then we had the hearing on the
9 motion to stay this case. And I denied that. So
10 that's where we are here today.

11 Let me ask y'all, while we're just
12 chatting here, looking at your motions, are y'all
13 seeing this thing as going off on a trial, or do
14 y'all see it going off on these cross-motions; that
15 I issue an opinion, and then that's how this case
16 gets resolved?

17 MR. GREIM: Your Honor, we actually
18 prefer -- and we're hoping just to have a -- maybe a
19 one-day bench trial, which would have been a lot
20 like summary judgment, but we would have just come
21 here and presented -- you know, we would have
22 deposition designations and things like that. We
23 didn't see a need for further live testimony.

24 But when we learned that the defendants
25 really wanted to file summary judgment, we thought,

1 well, you know, if we're going to be briefing, let's
2 see if we can get the case resolved then, so we can
3 just limit the costs for all the clients here.

4 So, as we looked at the briefing, we think
5 it can be resolved on cross-motions for summary
6 judgment. I think, as you go through, you'll see
7 that the actual facts of this case are not disputed.
8 What people say the impact of those facts are might
9 be subject to argument, but this is not a question
10 where one witness said one thing and somebody else
11 said another and you're going to have to judge
12 credibility.

13 THE COURT: And is that -- are y'all, is
14 the State looking at it the same way that, now that
15 we have cross-motions, you're not really seeing a
16 need for a trial?

17 MS. SCHREMMER: Yes, Your Honor.

18 THE COURT: You're seeing that it will go
19 off on an opinion like on the cross-motions here?

20 MS. SCHREMMER: Yes, we think the motions,
21 especially, have been clarifying. We've got legal
22 issues and not really fact disputes. And with the
23 cross-motions, everything except what has been set
24 aside by your prior order is on the table at this
25 point. And so I agree with what Mr. Greim said.

1 THE COURT: Okay. Well, I think I know
2 the State's position on this. But like you said,
3 you were surprised we're sitting here in June
4 without anything from the Tenth Circuit. Do you
5 still want to go forward on this, or do you want to
6 wait and get guidance from them, because they seem
7 to disagree with something I did in the preliminary
8 injunction. And it would be nice to know what their
9 thinking is on all those issues.

10 MR. GREIM: Your Honor -- and to kind of
11 harken back to our last -- in fact, I think that was
12 the last time we saw Ms. Lecocq, now that we're
13 thinking back to our times here -- we think that the
14 preliminary injunction presents narrower issues.
15 It's really based on the case as it existed last
16 summer. After the appeal -- or I'm not sure exactly
17 how this fell, but we filed an amended complaint.
18 We have an entire set of MVRA issues here that have
19 nothing to do with what's at the Tenth Circuit right
20 now. And I mean, there is a lot of other groups --

21 THE COURT: The only thing that's really
22 at the Tenth, the only thing I enjoined on was the
23 prior restraint; right?

24 MR. GREIM: That's right.

25 THE COURT: And everything else I pretty

1 much denied your motion, but granted it on that
2 narrow prior restraint of the voter rolls that you
3 already had obtained.

4 MR. GREIM: That's right.

5 THE COURT: So that's the reason we pulled
6 prior restraint out here because it looks like I got
7 that wrong.

8 MR. MUELLER: I can probably answer that.
9 So there is three primary issues in the appeal, and
10 you can check me here, but one of them is the prior
11 restraint, and whether, legally, that was correct.

12 The second issue has to do with viewpoint
13 discrimination and whether --

14 THE COURT: I didn't think I granted you
15 relief on that. I said you were likely to succeed
16 on the merits, but I said I'd have to go back and
17 look. I didn't think I granted any relief there.

18 MR. MUELLER: I think we agree with that.
19 But nevertheless --

20 THE COURT: So why would that be up there
21 if that's not part of the PI?

22 MS. SCHREMMER: Well -- and if I can, to
23 the extent that one party was, perhaps, confused or
24 mistaken about the order, that was a mutual mistake,
25 and both parties did kind of read the order as kind

1 of sending up several issues. And so we do agree
2 that both parties have briefed those. And we may
3 well get guidance from the Tenth Circuit on those,
4 or the Tenth Circuit may correct us as to the scope
5 of the PI order. But those are up before the Tenth
6 at this point.

7 MR. MUELLER: And, Your Honor, I believe
8 the reason viewpoint discrimination tied in that
9 appeal is because your order did make statements
10 that -- or making findings of viewpoint
11 discrimination. But because I believe that was tied
12 to the decision to not give the VRF additional voter
13 data. And at the time of the preliminary injunction
14 we weren't asking for relief on that point. So I
15 believe there is specific language in your order
16 that makes a finding of viewpoint discrimination,
17 but says that because we didn't ask for relief by
18 way of ordering the defendants to provide the voter
19 data, that wasn't part of the relief granted in the
20 PI.

21 THE COURT: And what was the third issue
22 you said is up there?

23 MR. MUELLER: The third issue, I believe
24 they raised an argument that the attorney general
25 was improperly enjoined in particular. I don't want

1 to misstate the exact argument they made, but
2 generally, that was -- the point was, I believe,
3 their argument at least was that a bulk of the
4 evidence was as to the actions of the Secretary of
5 State. And so they made an argument on appeal that
6 injunction improperly enjoined the attorney general.

7 THE COURT: Okay. Well, then it looks
8 like we have issues to deal with here, and we'll
9 just see what they do. But I guess we've got our
10 work to do.

11 MS. SCHREMMER: Your Honor, if we could
12 return to the question you had posed to Mr. Greim.
13 As much as I hate to have ginned everything up for
14 this hearing, and not have it, I do anticipate some
15 duplicate work and use of resources in the event
16 that we proceed now, receive an order from the
17 Tenth, and then revisit the kind of lingering
18 issues.

19 And so from that perspective, I do think
20 that we would advocate waiting for guidance as we
21 did when we sought to stay this. But at the same
22 time everyone is here, and these folks have traveled
23 out, and I do understand they'd like a chance to
24 talk. But I do worry about proceeding ahead and
25 then being in the exact same spot six months from

1 now.

2 THE COURT: Well, I don't disagree with
3 that, but like you said, we're all here, let's argue
4 it. And this is going to take me a while to digest
5 anyway. So maybe the Tenth Circuit will give us
6 some guidance while I'm putting the opinion
7 together.

8 I'm open to suggestions how to argue all
9 these issues. It seems to me that the issue we
10 probably ought to argue first is the MVRA issue.
11 And I don't know if that's got -- I know it's got a
12 lot of subparts. But can we argue it all together?
13 Do y'all want to argue it separately?

14 Since the defendant, I think, moved first
15 here, I was going to give the State the opportunity
16 to open. Are you open to arguing the MVRA first,
17 and then letting the plaintiff respond? And I'll
18 give everybody a chance to say what they want on it.
19 Does that sound okay?

20 MS. SCHREMMER: Yes, Your Honor.

21 THE COURT: I guess, as a preliminary
22 matter, I lean toward the State on the MVRA issue.
23 It seems to me that the language that we're talking
24 about here doesn't really cover voter rolls and
25 voter history. It's talking about the program that

1 the State implements to do what the MVRA requires
2 from a federal standpoint here in New Mexico.

3 So I'll certainly listen to what anybody
4 wants to say on it, but I'm inclined to think the
5 language that the plaintiff is relying on does not
6 include the material that's being sought here.

7 But Ms. Schremmer, are you going to take
8 the lead on this?

9 MS. SCHREMMER: Yes, Your Honor.

10 THE COURT: Ms. Schremmer.

11 I just had my law clerk call the Clerk of
12 the Court, the Tenth Circuit. And they say the
13 Tenth Circuit will not issue an opinion to explain
14 its order staying the preliminary injunction.
15 Apparently, it is their policy, pursuant to Rule 8
16 of Appellate Procedure to simply state that the
17 factors weighing in favor of the stay are met
18 without further explanation. So we're not going to
19 get anything further on this order. Whatever y'all
20 are briefing right now on the preliminary
21 injunction, I guess you'll get an opinion on that,
22 but not on the --

23 MS. SCHREMMER: On the stay specifically.
24 Understood. Thank you.

25 THE COURT: Was that kind of what y'all

1 were thinking?

2 MS. SCHREMMER: Yes.

3 THE COURT: Or were y'all thinking
4 something was going to come out --

5 MS. SCHREMMER: No, I think --

6 THE COURT: So the opinion y'all are
7 waiting for is one on the briefing that you just
8 finished up?

9 MS. SCHREMMER: Yes, Your Honor.

10 THE COURT: All right. Go ahead, Ms.
11 Schremmer.

12 MS. SCHREMMER: I will keep this brief. I
13 know you've read up on this case and have thoughts,
14 and to the extent I can answer questions, I would
15 very much like to do that. I do think the main
16 point is the one that Your Honor has just
17 highlighted, which is that the language of the MVRA,
18 while it does grant some access rights, is
19 relatively narrow compared to what VRF is seeking
20 here.

21 If we compare the language of the statute,
22 which relates to programs and activities of the
23 State to the wide-ranging requests that VRF has
24 designated as MVRA requests, which seeks things like
25 where individual voters voted in a particular

1 election, an analyses of what groups of voters have
2 done what with their registration in the time since,
3 that goes far beyond what the MVRA anticipates.

4 Moreover, we may have still not received
5 much clarity from VRF as to what portions of their
6 data requests, which were, from the outset, made
7 under New Mexico State law, and only through the
8 course of this litigation started to have the tag
9 attached of the MVRA, what subset of those requests
10 actually relate to state programs and activities
11 versus requests under New Mexico's broader state
12 law.

13 And not to jump around too much, but this
14 is where the notice issue kind of looms large.
15 There has not been a meaningful exchange as to what
16 we might be able to do to satisfy any portion of the
17 request that actually relates to New Mexico's
18 programs and activities.

19 And there is not Tenth Circuit precedent
20 here. The Fourth Circuit precedent on which VRF
21 relies references specifically how those states
22 conducted specific programs and activities. And
23 here, just the wide-ranging request for the entire
24 voter roll is not falling within that statutory
25 language.

1 Moreover, the MVRA relates to having
2 access to that data. It does not prevent states or
3 any governmental body, then, from proscribing
4 certain uses of that data. And so that's really
5 where the rubber meets the road in this case, is the
6 distinction between a right of access, which is much
7 more limited than VRF claims, and a right to use.
8 And specifically here, the right to publish
9 wholesale all of New Mexico's voter data online is
10 so far beyond what the MVRA grants the right both to
11 obtain and then to use that data for, as to really
12 make that the issue.

13 And so really I think the nut of this is,
14 first, is there any right to access all of the data
15 that VRF wants. And then second, does that in any
16 way constrain New Mexico from trying to impose
17 responsible regulations on the data that it has used
18 its governmental powers to collect? And the answer
19 there is, no, there is nothing in the MVRA that
20 would prevent that.

21 There is no conflict between the MVRA and
22 New Mexico State law that would permit preemption.
23 And especially, when we're talking about obstacle
24 preemption, which is where VRF gets its argument
25 from. That is to be applied with such a light touch

1 that here, where we have two separate realms:
2 Access and use, there is no conflict, and those two
3 statutes can happily exist side by side, and they
4 can in this case.

5 THE COURT: All right. Anything else on
6 the MVRA, Ms. Schremmer?

7 MS. SCHREMMER: Not unless Your Honor has
8 questions that I can answer.

9 THE COURT: Let's see what the plaintiffs
10 want to say, then I may have questions. Thank you,
11 Ms. Schremmer.

12 Mr. Greim.

13 MR. GREIM: Your Honor, I think I'll start
14 with the text of the statute. There is nothing
15 special about how New Mexico keeps its voter data
16 that would really justify making this the first
17 court in the country. There has been no precedent
18 cited anywhere where a district court or a court of
19 appeals has said that the voter rolls are beyond the
20 MVRA.

21 THE COURT: Well, but isn't the opposite
22 true? Nobody said that the voter rolls fall within
23 that language?

24 MR. GREIM: I think we've cited some cases
25 that actually go the other direction. And so the

1 four cases I've got are Judicial Watch versus Limon,
2 from 2019. That covered the voter registration
3 information records. That was the first one.

4 The second one is Project Vote, Voting for
5 America versus Long, that's the Fourth Circuit case,
6 finding that the registration applications -- that's
7 the same data that goes into the list --

8 THE COURT: When you say voter
9 registration information records, that's still not
10 what you're seeking here, is it? I mean, here,
11 you're seeking the voter information, addresses, and
12 then the history here. So do you have one that
13 covers what you're asking for?

14 MR. GREIM: Yeah, I do. But let me,
15 before I come back to the cases, I think the
16 actual -- your question makes me realize the real
17 first starting point is what's the data we're
18 looking for? So, Your Honor, there are not several
19 different sources of data out there, several
20 different lists, one cluster of addresses, another
21 cluster of history.

22 There is a single database called SERVIS,
23 S-E-R-V-I-S. And that database -- and by the way,
24 states are required under federal law to have such a
25 database, they're required to do that. And so

1 wherever the applications come in from, the data all
2 gets put into SERVIS. So that has -- you know,
3 whatever goes on the registration application:
4 Name, address; it can have Social Security number
5 and birthdate. But New Mexico doesn't make that
6 publicly available, and no one is fighting about
7 that here. But then it has other information, too.
8 For example, when someone votes in an election,
9 there is a field in the SERVIS database that shows
10 that they voted. If they change their registration
11 address, that gets reflected in the database as
12 well. And those are the programs and activities --
13 those are the programs and activities that the MVRA
14 is talking about. So the place -- the repository of
15 information about these programs and activities, all
16 the keeping the list up to date, everything about
17 recording voting information, that is the list.
18 That is the list.

19 And so I understand -- now, to come back
20 to the text -- I know I'm bouncing around, but I
21 think this makes sense. I recognize the text of the
22 public disclosure provision says: All records
23 concerning the implementation of programs and
24 activities conducted for the purpose of ensuring the
25 accuracy and currency of official lists. But court

1 after court has said that is the list. That is the
2 list, because that list is not just a list. I mean,
3 we call it that, but it shows when did the Secretary
4 of State last update this voter? When were they
5 moved to inactive because they didn't vote for
6 several elections? When did they die? Their name
7 is still on there with a line showing that they were
8 taken off for having passed away. So all of that is
9 on the SERVIS database. And what VRF is trying to
10 do, in part, is to show how good of a job is the
11 Secretary of State doing in keeping that list.

12 So there isn't -- I mean, if you were to
13 read the disclosure provision narrowly, there isn't
14 a special record out there that says: Here are the
15 programs and activities that I undertake. That
16 information is all in the database itself, and
17 that's the reasoning of these courts.

18 Another one, Public Interest Legal
19 Foundation versus Matthews, Central District of
20 Illinois, 2022: Voter list is a record.

21 Public Interest Legal Foundation versus
22 Bellows, District of Maine, 2022, found the same
23 thing.

24 And, in fact, Your Honor, we cited to you,
25 in 2023, just in March of this year -- that's why we

1 filed a notice of supplemental authority to the
2 Tenth Circuit -- that district court said that the
3 ban on internet disclosure of that list violated the
4 MVRA. So there are no cases saying that these
5 different secretaries of states' lists are not part
6 of public disclosure provision. There are cases
7 saying that they are. And case after case --

8 THE COURT: But your universe is four
9 cases; right?

10 MR. GREIM: That's -- I think that's
11 right. That's what I have in my --

12 THE COURT: And of those, how many of them
13 actually dealt with the list that we're talking
14 about here?

15 MR. GREIM: Your Honor, I think two of
16 them dealt with the list itself. But I could be
17 wrong about Long and Limon. I'd have to go back to
18 those two cases from Maryland and the Fourth
19 District. District of Maine and Matthews dealt with
20 the list itself.

21 But I would also say this: There really
22 isn't a reason why we should distinguish between the
23 applications themselves and the list, because the
24 application data is what gets put in the list. If
25 anyone wants to see what's going on, you don't go

1 look at the individual applications, which aren't
2 even kept in a central location. You look at the
3 list itself.

4 THE COURT: But when I read the language
5 from the statute, what comes to my mind is, like,
6 there is a policy or a handbook or something that
7 says how we're going to do this; not here's what we
8 have actually done.

9 MR. GREIM: Right.

10 THE COURT: So that's the reason the
11 language seems to me to be more of a static -- just
12 a -- you don't get the implementation documents.
13 You get the game plan as to how New Mexico is going
14 to put that list together.

15 MR. GREIM: Well, Your Honor, I think what
16 the Long court said -- and that was what was argued
17 in Long -- and what the court there said was: The
18 language says, "All records concerning the
19 implementation of programs and activities." And so
20 the list itself is the ultimate record concerning
21 the implementation, because that shows you what you
22 did.

23 I mean, there is not a single case -- I
24 don't even hear the defendants here to say that --
25 when they say, well, there is some information they

1 could get, we're not really sure. They haven't come
2 in and said: Oh, they just want the handbook.
3 Well, that's just the CFRs -- or not CFR, the Code
4 of State Regulations; they tell us what to do. So
5 look on the website, you can see our code of state
6 regulations. That meets the public disclosure
7 requirement.

8 I mean, Your Honor, I don't think that
9 argument has been raised anywhere. And I don't
10 think it's been accepted anywhere. And it certainly
11 hasn't been made by the defendants in this case.

12 So I understand -- I mean, I understand
13 your point, because it says "all records
14 concerning." But every court that has looked at
15 this has said: The purpose of the MVRA was to allow
16 the public to be able to monitor whether this is
17 working correctly. And if all you have to do is
18 turn over the handbook that says: This is what we
19 want to do, then we won't know whether they're
20 actually doing it.

21 I mean, there are other records concerning
22 the implementation, like the database, showing what
23 the Secretary of State believes is the address of
24 someone, and when it was last updated, that wouldn't
25 be disclosed. And that seems to violate the plain

1 text of the public disclosure provision.

2 And I understand the Court's point. But
3 it just seems to be against the clear weight of
4 authority across the country.

5 Now, there are some other arguments that
6 they've raised here. I was surprised to hear -- I'm
7 still not sure what this means, but we've heard that
8 there are some records that they could disclose. I
9 would be really curious when they stand back up here
10 again, to hear what they say those are. I wonder.
11 I mean, if their position is that it's no part of
12 the list, that would be the first time we've ever
13 heard it. It's not even in the briefing. So I'd be
14 curious what that is. That can't be right.

15 THE COURT: I'm not tracking. What did
16 you hear Ms. Schremmer say?

17 MR. GREIM: Sure. She said: Well, we're
18 still not really sure what they're asking for, which
19 parts of the MVRA or not. I heard her say this:
20 Maybe there are portions of the request that we
21 could agree to that are covered by the MVRA. I
22 mean, I would love to know what that is. If there
23 is any part of the voter file that they say is
24 subject to the MVRA, then that kind of begs the
25 question of why is part of the voter file okay and

1 other parts not.

2 I mean, again, we'd be making brand new
3 law in this district court, I think, on that. But
4 I'd be really curious to see what the defendants
5 say.

6 The other thing I want to point out here.
7 There were three requests. One of the objections
8 that's been made is: Well, the requests don't say
9 MVRA. They don't say -- they don't use the words
10 MVRA. Now, of course, the May request does. The
11 February request didn't.

12 But there is no requirement under the
13 statute, Your Honor, that someone cite the MVRA.
14 What triggers the MVRA is asking for documents
15 covered by the MVRA. There is no special
16 requirement.

17 It's also interesting that they suggest
18 that these are only made, quote, "under New Mexico
19 law." Again, we don't really know what that means.
20 There is one database. Again, there is one
21 database. There is one way to request those. Even
22 under the MVRA, they require that you use that same
23 application; that you fill out the same affidavit.
24 And that's part of the problem.

25 The other thing I want to address is this

1 argument that they don't actually have records at
2 all. So just to really tease out what this means,
3 remember we've said there is a SERVIS database. So
4 they say, Well, the MVRA talks about records. Well,
5 we don't have any records. We just have raw data
6 existing on the database. So therefore, we have
7 nothing to produce under the MVRA. That argument
8 was made in response to our request, and it was made
9 in the briefing, which is intriguing. Because if a
10 state could do that -- I mean, every state does keep
11 their information in a database. If a state could
12 do that, you would never have to answer an MVRA
13 request, you would just say: Gosh, we don't really
14 have records or reports for new registrations from
15 December to June. We would have to go pull that
16 from our database and that makes us do work.

17 But what we learned is that the Secretary
18 of State does exactly that. They keep everything in
19 the database, and they have a couple algorithms
20 drafted by their -- you know smarter people than any
21 of us, probably -- which when somebody sitting at a
22 terminal types in the criteria for the request, that
23 algorithm goes and pulls the data from the database,
24 and then, that's the quote "report" that they send
25 on. So every response that they make under the MVRA

1 ends up pulling raw data into a report.

2 We also learned that if somebody makes a
3 request that they don't already have an algorithm
4 set up for through their software, they just go and
5 write that algorithm. And they go pull the data.
6 They just have to specially code it to be able to
7 pull the data off.

8 So that's all that ever happens in New
9 Mexico. It's all that ever happens in other states,
10 is that these databases exist. And usually, the
11 Secretary of State officials -- but in some states
12 it could be county clerks -- can go in and type in
13 information and pull that out. That's how the MVRA
14 is complied with everywhere across the country.

15 New Mexico doesn't even need to have its
16 own state statutory provisions making it available.
17 But it does, which is a separate question which we
18 can get to in just a second.

19 So that's basically our MVRA argument.
20 The one thing I want to leave with, which is sort of
21 a segue to the First Amendment point, is this idea
22 that, in New Mexico -- and in a few other states,
23 too -- they've tied access to use. So the MVRA
24 says: You get access to certain things. And we
25 know that the MVRA has four purposes, and we know

1 that this advances those purposes.

2 If a state says: I'm going to give you
3 access, but I need you to make me some promises; I
4 need you to -- let's just say not criticize the
5 Secretary of State with the data, that's not what we
6 have here, I understand. But you're going to have
7 to give up some rights, some speech rights, before
8 you get the data. That's a problem. That's a
9 problem.

10 And that has to be -- aside from being a
11 First Amendment issue, it has to be scrutinized
12 under the MVRA. Because Congress did not set up a
13 regime. It didn't say: States, you've got
14 authority to go allow whatever access you want. It
15 says: This information shall be provided. And if
16 you keep requesters from doing the very things with
17 the data that the data exists for, you are
18 undermining the purpose of the MVRA.

19 The MVRA does not just exist so that
20 Public Interest Law Foundation -- the plaintiff in a
21 bunch of these cases that will appear on Westlaw --
22 so that their smart gnomes can sit at a computer and
23 do all the research and then issue a report. I
24 mean, they exist to allow the public to do this.

25 It's lucky that we have a Public Interest

1 Law foundation. It's lucky that we have Voter
2 Reference Foundation. But they don't have to exist.

3 And so, what Congress intended to do was
4 to let citizens have a role in this, and not just
5 rely on the Secretary of State saying: Trust me,
6 here's my policy. I always update it. I'm doing
7 it. You just have to take from it there and trust
8 that I'm doing it. Here's my manual. We're
9 supposed to follow this in our office. That is not
10 what the MVRA sets up. And the use restrictions
11 here, which keep us from sharing it with everybody
12 who agrees to follow New Mexico law, gets directly
13 in the way of what Congress intended.

14 So, Your Honor, you don't have to find
15 that there is preemption. We have two different
16 counts. We have a violation count that they failed
17 to give it to us, even when we said: Until we hear
18 from Judge Browning, we're not going to do anything,
19 just let us have it. They still said no. So
20 they've got violation problems.

21 But there is also the preemption issue.
22 Those are in different counts and they have to be
23 analyzed separately.

24 So I know I've said a lot. I've sort of
25 jumped around. But I could take questions, if you

1 have some, Your Honor.

2 THE COURT: Well, let me hear from the
3 State on the MVRA, and then we'll come back and pick
4 up another issue.

5 Ms. Schremmer.

6 Thank you, Mr. Greim.

7 If I adopt your narrower interpretation of
8 the statute than Mr. Greim, what is it that they
9 get?

10 MS. SCHREMMER: Well, Your Honor, frankly,
11 I am not sure. And this gets back to the comment
12 that sparked such interest.

13 THE COURT: Isn't that a weakness, though,
14 of your position? Because there has got to be
15 something, or otherwise Congress wouldn't have put
16 in that language. So if all that you have is this
17 voter list, then it seems to me that that undercuts
18 your position.

19 MS. SCHREMMER: No, Your Honor. I think
20 it's a weakness with the requests. The requests
21 were never aimed at MVRA information.

22 THE COURT: Well, put aside the requests.
23 Tell me what you have that fits the definition of
24 the statute.

25 MS. SCHREMMER: Right. And frankly, I

1 don't know, because we have not had the opportunity
2 to analyze serious requests that are matched to
3 programs and activities.

4 THE COURT: Well, it concerns me that the
5 State doesn't know what it has. It says: Here's
6 this little definition, we're going to take this
7 narrow definition, but we don't know if we have
8 anything that fits that.

9 MS. SCHREMMER: And if I could, Your
10 Honor, I apologize, I don't work in the Secretary of
11 State's Office. I know there will be records that
12 are responsive. I don't think the Secretary has had
13 a fair opportunity --

14 THE COURT: I think you probably need to
15 tell me. You probably need to get over to the
16 Secretary of State's Office, and say: Here's this
17 definition. We think the judge is buying our
18 definition of it. What do you have that's there?

19 MS. SCHREMMER: So examples would be
20 handbooks or manuals that are given to poll
21 watchers. There would be policies and procedures
22 internally for how this list is maintained. There
23 would --

24 THE COURT: I would assume, also -- and
25 you can correct me -- but it sounds like, from time

1 to time, the Secretary of State runs some
2 programs -- Mr. Greim says algorithms, and you may
3 agree with that -- they run some programs and
4 produce some reports about how well they're doing.
5 So it seems to me that those are the kind of things,
6 in my mind, that Congress says --

7 MS. SCHREMMER: Right.

8 THE COURT: -- the public gets.

9 MS. SCHREMMER: And other items that I
10 know were testified to in the Secretary's 30(b)(6)
11 deposition where -- you know, reports they received
12 from county officials, in terms of citizens who have
13 died, citizens who have moved.

14 And so there are internal programs meant
15 to make sure that these items are maintained. And
16 I'm sure there are programs as well, in terms of
17 encouraging voter participation. So there will be
18 various manuals and reports and policies for how
19 these things are maintained.

20 I guess my point in my earlier statement
21 was that we need an actual request that we could
22 analyze and give a response to.

23 THE COURT: Well, maybe. But I've got to
24 interpret -- y'all have agreed that I'm interpreting
25 a statute here, and you need a legal ruling on it.

1 I guess I'd really like to have -- you know, you can
2 quibble about the request and you can do that all
3 day long. But in the end, I've got to interpret a
4 statute. And if you tell me: Here's our
5 definition, and there is no documents that fit it,
6 and they really are all on the program that they're
7 trying to seek, then that's going to trouble me to
8 interpret something that would have no meaning.

9 MS. SCHREMMER: Well, I --

10 THE COURT: I think it's your obligation
11 to tell me what documents -- even if their request
12 is faulty, I think you've got to tell me what
13 documents the Secretary of State thinks falls within
14 the narrow definition, and would produce if
15 requested.

16 MS. SCHREMMER: Sure. And I understand
17 Your Honor needs to interpret the statute. But it
18 needs to be interpreted, respectfully, with respect
19 to the actual requests in this case. So something
20 that might help us both is to just look at the
21 requests.

22 THE COURT: Well, I'm telling you what you
23 need to do.

24 MS. SCHREMMER: Okay. So --

25 THE COURT: You need to do it. And if you

1 want to quibble over the requests, that's fine. But
2 I need something from you telling me what falls
3 within it, and then we can talk about the request,
4 whether it's made or anything like that. But I need
5 this to interpret the statute. If you want me to
6 buy your definition -- which I'm leaning toward --
7 you've got to give it content. And I'm not going to
8 probably write an opinion that says: Yeah, I agree
9 with the Secretary of State's, and the AG's position
10 on this, but I have no idea if there is any
11 documents that fit this. I'm just probably not
12 going to write that opinion.

13 MS. SCHREMMER: I understand, Your Honor,
14 Would you accept supplemental submissions on this
15 topic?

16 THE COURT: Yes, a letter, or a short
17 brief or something. If I'm going to buy your
18 interpretation, you've got to give me content: This
19 is what we understand we do have an obligation under
20 the MVRA.

21 If you go back and you say: No, we don't
22 think there is any, then I'm going to probably start
23 looking at their definition, because if it's all in
24 a database, then they may be right, if that's the
25 universe. But I guess I'm thinking that there may

1 be some materials that you have that fit your
2 definition, which I'm leaning toward.

3 MS. SCHREMMER: Sure. And I'm not trying
4 to be argumentative. I want to make sure that
5 whatever we provide is helpful. Are you looking for
6 just the open universe of anything that might be
7 responsive, or are you looking for, within the
8 requests actually given to us by VRF, here is what
9 we think falls into the MVRA?

10 THE COURT: What I'm talking about is put
11 aside their request.

12 MS. SCHREMMER: Okay.

13 THE COURT: You can quibble with them, and
14 you can quibble with me later about the request.
15 But I need to know what it is that -- you've got a
16 definition that I'm inclined to agree with. All
17 right. What falls in that? Is there really
18 documents that fall within that?

19 If there is not, if it's all in a
20 database, then I'm going to start relooking at what
21 the plaintiff is proposing. But I'm inclined to
22 think that there are things that fit the definition
23 of: How do you implement this, and then probably
24 algorithms, generate reports to test that you're
25 doing it correctly, those sort of that things.

1 I'd be as exhaustive as possible. What is
2 it -- you know, don't just give me examples, really
3 bottom out over there, what it is that they do to
4 comply with the MVRA.

5 MS. SCHREMMER: Certainly.

6 THE COURT: So that we know that there is
7 a universe of documents that are there.

8 MS. SCHREMMER: Yes, Your Honor. We will
9 make sure to get that to you.

10 THE COURT: Anything else you want to say
11 in response to Mr. Greim?

12 MS. SCHREMMER: Yes. I'll keep it short.
13 And certainly I want to make sure we get Your Honor
14 what he needs in terms of what documents the
15 Secretary would have under the MVRA.

16 I do want to clarify, though, that VRF, at
17 least via Local Labs, has received voter data
18 previously, and but for anticipated use of posting
19 it on the internet, could have received it again,
20 whether that be under the MVRA or under New Mexico
21 state law.

22 So I don't want there to be this
23 impression that there is some game of cat-and-mouse:
24 Until you ask us the exact right question, we're not
25 going to give you anything. The driving force

1 behind this entire dispute has always been the
2 publication online. So it's not just about the
3 access right under the MVRA.

4 THE COURT: I would assume that under the
5 MVRA, there is a set of documents that you tell me
6 that are part of -- concerning the implementation of
7 the voter program, they can take that information
8 and post it on the internet, that's not restricted.

9 MS. SCHREMMER: I would disagree, Your
10 Honor, and other courts have disagreed. Contrary to
11 the statement that you would be the first court in
12 the country to make such a finding, there are
13 several courts who have noted that Congress did not
14 intend, quote, "to erode federal and state law
15 protecting against disclosure of private personal
16 information by enacting the MVRA."

17 THE COURT: Well, but see, I do think
18 you're playing a little cat-and-mouse game here. If
19 we're not talking about the voter list, we're
20 talking about the documents that you have
21 implementing the MVRA --

22 MS. SCHREMMER: I misunderstood, Your
23 Honor.

24 THE COURT: -- I think they can take that
25 and they can run with it, and print it, put it on

1 the internet, and everything like that, because
2 that, then, is controlled by federal law.

3 MS. SCHREMMER: Yes. I misunderstood. I
4 thought we were talking about the voter data, which
5 we would still contend, even if there is some MVRA
6 document that contained incidentally identifiable
7 voter data, we would maintain you still cannot use
8 that in the way that VRF wants to. Because, again,
9 the MVRA statute allows for public inspection. It
10 does not give a right of publication of everybody's
11 private information.

12 THE COURT: Okay.

13 MS. SCHREMMER: Thank you, Your Honor.

14 THE COURT: Anything else?

15 MS. SCHREMMER: No, Your Honor.

16 THE COURT: All right. Give you the last
17 word on the MVRA, Mr. Greim.

18 MR. GREIM: Sure. Thank you, Your Honor.

19 I wanted to clarify one thing. When I
20 mentioned algorithms, I was listening to your
21 questions of counsel. And I want to be really clear
22 what the record says. Our motion for summary
23 judgment lays this out. The algorithms are not
24 special programs the Secretary of State implements
25 to make sure the database is okay. The algorithms

1 are sort of like commands that pull data from the
2 database when somebody fills out these affidavits we
3 talked about a year ago, and says: I would like
4 everyone who is registered in Santa Fe from this
5 date to this date. There is an algorithm that pulls
6 that data off from the SERVIS database.

7 So there is no evidence in the record, and
8 I don't think there is such a thing as some sort of
9 background algorithm the Secretary of State runs to
10 spot check things. I mean, there is not a thing
11 about that in the record, after many depositions.

12 But that kind of goes back to our point.
13 In every other state what they're saying is: The
14 state database is that record. And it's not just
15 the list. If you go out for a certain person -- you
16 have to imagine columns, column N is going to be
17 this record was last edited on such and such date.
18 What was the edit? We changed the address. So it's
19 all right there.

20 And the point that all these other courts
21 make is, if it's all records concerning the
22 implementation of these programs, that is the
23 database.

24 So I know I'm repeating myself. I just
25 wanted to mention that.

1 And the other thing I want to point out:
2 Counsel started to answer a question -- there was
3 kind of maybe a miscommunication -- she was trying
4 to say that there are cases that say that: If you
5 erode these privacy rights, you know, the MVRA is
6 not intended to do that, we're not intending to put
7 private personal information out there.

8 But we discuss this in our briefing. If
9 you look at those cases, what they have done is,
10 they have allowed the voter registration data to be
11 released. But they fought about whether the Social
12 Security number that those particular states would
13 allow to go out the door, or the birthdate, the full
14 birthdate of someone they would allow to go out the
15 door should be released. And what they've done is
16 they looked at other federal statutes that are more
17 specific, and say: We know about the MVRA, but you
18 can't send out driver's license information like
19 their birthday.

20 And so that's what those cases establish.
21 The exception proves the rule. The exception proves
22 the rule. It's other federal statutes that are
23 raising the privacy concerns, and that are culling
24 out parts of what those states have otherwise
25 released.

1 We don't have that here, though, because
2 they don't release Social Security numbers. We
3 don't want them. They don't release the full
4 birthdate. We don't want that. We just have the
5 birth year.

6 And I think I've said all I can say.

7 THE COURT: All right. Well, I'll look
8 for this material you're going to tell me. And be
9 exhaustive. I mean, you've really got to sit down,
10 I think, with the Secretary of State and say: The
11 judge is leaning toward our definition, but he wants
12 to know what's in there. If there is nothing in
13 there, he's probably going to start relooking at the
14 plaintiffs' position, and their interpretation.
15 Because if there is nothing there, I probably am not
16 going to feel comfortable saying Congress passes a
17 statute and says you get this information, and there
18 is nothing in the box. So I'm inclined to go with
19 you on this one, but I'm going to need some help.
20 So be exhaustive on it.

21 MS. SCHREMMER: Understood. Thank you.

22 THE COURT: So where do y'all want to go
23 next? What's the next issue? And I'll go to the
24 defendants here, because I think you filed your
25 motion first. Which issue would you like to cover?

1 MS. SCHREMMER: I think we can probably
2 deal with most of the First Amendment kind of in one
3 bucket, if that's all right with Your Honor.

4 THE COURT: All right. Well, let me say
5 this on the First Amendment. And you can correct me
6 if I'm wrong. But my memory is I pretty much said
7 in the preliminary injunction, I didn't see a First
8 Amendment right of access to this information. If
9 somebody wants to tell me that I was more nuanced or
10 something like that, but I pretty much have said
11 that I don't see a First Amendment right of access
12 to this information.

13 Now, if it's being disclosed, it can't be
14 disclosed in a discriminatory way, and that's the
15 viewpoint discrimination. But just as a matter of
16 access, is that the narrow issue you want to take,
17 or do you want take a broader First Amendment issue
18 on it?

19 MS. SCHREMMER: No, I think we're on the
20 same page, Your Honor.

21 THE COURT: Okay. So do you want to go
22 ahead, Ms. Schremmer?

23 MS. SCHREMMER: Thank you.

24 Both Your Honor and the plaintiff have
25 noted that there is no First Amendment right of

1 access. That was another point that was well
2 clarified through the summary judgment briefing, is
3 the concession from VRF that the First Amendment
4 does not generate any right of access to this
5 information. Their right of access is claimed
6 either through the MVRA or the state law,
7 exclusively.

8 And so that just leaves the question as to
9 whether, despite some First Amendment right of
10 access, VRF has some First Amendment right to use
11 that attaches afterwards. And the answer to that is
12 no.

13 What we have here is, as Your Honor just
14 mentioned, the Government has voluntarily granted a
15 conditional right of access to information that the
16 First Amendment does not require the Government to
17 produce.

18 What VRF is asking the Court to do, then,
19 is say that, despite Government conditioning this
20 right of access, we can ignore those conditions on
21 some First Amendment ground.

22 So where New Mexico allows, under state
23 law, the inspection or copying of voter rolls on the
24 condition that you not publicly disseminate or share
25 that information, VRF wants to say, then, despite

1 that condition and that agreement in obtaining that
2 information from the State, the First Amendment then
3 allows them to publish that information anyways.
4 And that is not the law. It can't be the law. And
5 they have cited no authority to suggest that is the
6 law.

7 Instead, the law is, as you have said,
8 that as long as the conditions placed are not
9 discriminatory, there is no First Amendment issue.
10 Of course, the Government cannot voluntarily and
11 conditionally grant access on some discriminatory
12 basis.

13 But that is not what has occurred here.
14 The Secretary of State routine provides this
15 information to all types of entities with all types
16 of viewpoints and missions.

17 The thing that sets VRF apart is what it
18 has done with the data, which is to post it
19 wholesale on the internet. And the Secretary has
20 long maintained -- there was testimony back at the
21 PI hearing on this very topic -- that if VRF would
22 just anonymize the data, there would be no issue.
23 If it wanted to post aggregate analyses of the data,
24 there would be no issue. If it wanted to make
25 statements critical of the Secretary based on its

1 inspection of the data, there would be no issue.

2 The only issue is the wholesale
3 publication of the information itself.

4 And what VRF is asking the Court to do
5 with the law would be equivalent to the military
6 opening White Sands Missile Range and telling you:
7 You can drive down this highway to the Trinity Site,
8 but don't take pictures for the next five miles.
9 And you say: Yes, sir, and then you do it anyway,
10 and you post it online because the First Amendment
11 allows you to speak about government behavior. That
12 is not what the First Amendment allows here.

13 THE COURT: Here's what concerns me about
14 the State's position is that, if they are willing to
15 say: We will not disclose this material unless this
16 Court tells them they can, it seems to me, when you
17 deny the request to this group, you run into the
18 viewpoint discrimination.

19 MS. SCHREMMER: I think that --

20 THE COURT: Because everybody else is
21 promising not to do that. They promise not to do
22 it. But you deny them the documents because you're
23 fearful they'll do it anyway.

24 MS. SCHREMMER: I think it's a little more
25 nuanced than that, Your Honor. Respectfully, what

1 they promised was: We won't publish this unless we
2 win our PI motion, which was only that the State
3 could not prosecute the behavior. There was no
4 condition --

5 THE COURT: But that was the documents
6 they already had. Now, we're talking about a
7 request.

8 MS. SCHREMMER: Yes.

9 THE COURT: And that's the thing that
10 troubles me, is that they are promising to do what
11 other groups are promising to do, and not publish
12 it, and you're saying no.

13 MS. SCHREMMER: Well, and the full text of
14 the request -- and I'll see if I can find the
15 citation to the exact exhibit -- was that we are
16 requesting this information for two projects. One
17 is to post online an analysis and not the data
18 itself. And we have no issue with that.

19 The other -- and this is what the request
20 said -- is to post this data online, which we will
21 only do if we have an order from the court on our
22 preliminary injunction.

23 Now, as we said in our denial to that
24 letter, we will abide by whatever the Court's final
25 determination is. But we were not comfortable at

1 the preliminary stage.

2 THE COURT: But I denied their request.

3 MS. SCHREMMER: I'm sorry?

4 THE COURT: But I mean, on the PI that was
5 there to force you to produce information, I denied
6 their request. So I didn't force the Secretary of
7 State to produce any documents.

8 MS. SCHREMMER: Right.

9 THE COURT: So for you not to give them
10 the documents seems to me that you're just singling
11 out this group because they're not going to publish
12 it either. They're making the same promises
13 everybody else is.

14 MS. SCHREMMER: Their request was
15 submitted before the PI order. Their request came
16 in on May 27.

17 THE COURT: I understand. But then I
18 denied their PI request.

19 MS. SCHREMMER: I guess I'm not following.
20 The PI was granted as to New Mexico's ability to
21 prosecute the publication of information online.

22 THE COURT: But the documents they already
23 had, that they'd gotten from Local Labs.

24 But if I understand what they're
25 requesting is they requested more data than they

1 had, and that was turned down.

2 And I also turned down their request to
3 force you to give them that information. So the
4 Secretary of State is not giving them information
5 when they're making the same promise everybody else
6 is.

7 MS. SCHREMMER: I guess, I would
8 respectfully disagree that they're making the same
9 promise as everybody else. They specifically
10 requested additional information for the purpose of
11 posting it online. And their response was: Because
12 you want to post this online, and because we believe
13 that to be a violation of New Mexico law --

14 THE COURT: Well, what if Local Labs would
15 really like to publish it mentally, subjectively,
16 but you'd give it to them.

17 MS. SCHREMMER: Right. And then if they
18 published it after the fact --

19 THE COURT: Then you'd do something about
20 it.

21 MS. SCHREMMER: Right. And that is what
22 happened.

23 THE COURT: But that's no different than
24 this group.

25 MS. SCHREMMER: Except that we had actual

1 knowledge of the intent to violate state law. Yes,
2 you're right that we'd take it --

3 THE COURT: But I guess I'm troubled by
4 that. Because if they're saying: We're not going
5 to do anything if the Court denies our PI -- which I
6 did -- I guess I don't understand why you're
7 singling them out.

8 MS. SCHREMMER: And maybe I'm
9 misunderstanding. The promise that was made was
10 that we won't publish this unless we get relief from
11 the Court, in terms of your ability to prosecute us.
12 That was how I read this promise that was made.
13 Unless you are enjoined from prosecuting us, we
14 won't publish it. Not: Unless we get affirmative
15 permission, by way of a final judgment that tells us
16 this doesn't violate the law.

17 THE COURT: Well, then, that's not what
18 their request said. It didn't talk about final
19 judgments or anything like that.

20 MS. SCHREMMER: No, it didn't. And that
21 was part of the problem. We believe that, in the
22 middle of this litigation it was more proper to wait
23 for a final ruling.

24 THE COURT: I just think you have problems
25 here.

1 MS. SCHREMMER: Understood.

2 THE COURT: I mean, I just think they're
3 making the same assurances everybody else is making.
4 And you're probably going to have to go to trial on
5 that issue. If you want a bench trial, we can have
6 a bench trial. But I do think that you've singled
7 them out, when they make the same promise as
8 everybody else. And I think it's because it's what
9 they want to do with it, not what they're going to
10 do. They made promises, just like everybody else,
11 that they won't do it.

12 MS. SCHREMMER: Well, and I --

13 THE COURT: And I don't think you can deny
14 a group, which you don't like, when they're doing
15 the same thing everybody else is. That's my sort of
16 simplistic analysis of this.

17 MS. SCHREMMER: Well, we disagree that
18 they were doing the same thing as everybody else.

19 But even taking Your Honor's view, if
20 there was some discrimination between VRF and
21 everybody else, it was not on the basis of
22 viewpoint. It was on the basis of the publication
23 online.

24 And they have admitted as much in their
25 response. What they're asking this Court to do is

1 to deem publication online as a constitutionally
2 protected activity.

3 THE COURT: I know what they're saying,
4 but I'm not going there. I mean, again, I think you
5 don't like their views.

6 MS. SCHREMMER: What views are those?

7 THE COURT: The documents that they are
8 entitled to, even if they say they're not going to
9 act on their views.

10 MS. SCHREMMER: And I'm not sure what
11 views those would be. The Secretary has provided --

12 THE COURT: We know what their views are.
13 They want to get this data and publish it on the
14 internet. And that's what you don't like. And they
15 want to do it to try to show problems, either in
16 this Secretary of State or across the nation. We
17 know what their views are.

18 MS. SCHREMMER: But the Secretary has
19 provided voter data to organizations with the exact
20 same platform when it comes to how elections are
21 run, or comes to being critical of the Secretary's
22 Office. And that's in the record and in the
23 briefing. And so it's not an issue of being
24 critical of the Secretary or critical of elections.
25 That has not stopped the Secretary from giving this

1 data to other organizations.

2 The difference is the publication of the
3 individual voter data online. And the Secretary has
4 always maintained, and maintains now --

5 THE COURT: I understand that.

6 MS. SCHREMMER: -- it's just an analysis.

7 THE COURT: I understand that.

8 MS. SCHREMMER: Okay.

9 THE COURT: But they are not going to
10 publish it.

11 MS. SCHREMMER: And if that's true, if Mr.
12 Greim stands up here and tells us they will not,
13 under any conditions, publish identifiable voter
14 data online, that's a different case.

15 THE COURT: Well, I mean, if the law
16 became that, you know, they could publish it, then
17 they would publish it. But they're not going to
18 publish it as long as the courts or you are saying
19 they can't publish it. But I think they're being
20 punished because of what they want to do.

21 MS. SCHREMMER: Which is to publish
22 individual voter data online.

23 THE COURT: Sure. That's what they want
24 to do.

25 MS. SCHREMMER: But that's not a protected

1 or discriminatory basis.

2 THE COURT: They get to think that.

3 MS. SCHREMMER: Sure.

4 THE COURT: And they get to advocate for
5 it.

6 MS. SCHREMMER: Absolutely.

7 THE COURT: And you can't say: Well, I
8 don't like your thought, so I'm not giving you the
9 data.

10 MS. SCHREMMER: And I completely agree
11 with that. If they wanted to post anonymized or
12 aggregated analysis, or if they wanted to post
13 statements critical -- a critical summary of their
14 review, that would not be an issue. That would be
15 no basis for which to deny them access.

16 THE COURT: But you don't get to decide
17 what they think.

18 MS. SCHREMMER: Right.

19 THE COURT: They can think the worst
20 things in the world.

21 MS. SCHREMMER: Absolutely.

22 THE COURT: But if they promise you
23 they're not going to publish it, then I don't see
24 how they're different than anybody else.

25 MS. SCHREMMER: I guess maybe that's what

1 it comes down to is how we interpret this promise.
2 I don't think there has been this kind of
3 unequivocal promise. And maybe Mr. Greim can
4 clarify that point. If the promise is: We're not
5 going to post this online until we have a final
6 judgment in this litigation that says yes or no it's
7 legal or not, that's a very different circumstance
8 than our understanding.

9 THE COURT: Okay. Well --

10 MS. SCHREMMER: Thank you.

11 THE COURT: All right. Thank you, Ms.
12 Schremmer.

13 Mr. Greim.

14 MR. GREIM: Your Honor, respectfully this
15 is the very definition of cat and mouse.

16 I pulled up the letter. I began to doubt
17 myself for a second, so I pulled up Exhibit K. This
18 is the letter we talked about a year ago. And we
19 mention the two projects. And we say: We will only
20 publish the personal information of voters online if
21 VRF is granted relief in -- and then we cited this
22 case -- or in any other legal proceeding. That's
23 what we said.

24 And then we said: For our second project
25 where it is anonymous, we are going to publish our

1 analysis, but we're definitely not going to disclose
2 the personal information of any voter data.

3 So that didn't even depend on what
4 happened in the litigation, because part of what we
5 do doesn't require posting individual voters'
6 information. That's part of what we do. So that
7 was very clear.

8 And interestingly, on that second piece,
9 which didn't even depend on what happened in the
10 court, they still rejected it.

11 Your Honor, I've said multiple times,
12 including in the stay hearing -- and this is all
13 laid out in our briefing -- that we would not
14 publish this information without an order of this
15 Court. There has been no question. And even the
16 reasons why they couldn't trust that promise, those
17 have even changed over time.

18 What we heard today is not the reason they
19 originally gave. The first reason they gave -- you
20 might recall this is -- well, we don't know what he
21 means by personal information of a voter. Maybe he
22 doesn't think their address or their name is really
23 personal information. That was too vague. We
24 couldn't understand that.

25 But now they've discarded that because I

1 think they eventually couldn't keep claiming that,
2 and they say: well, we weren't sure what in the
3 proceeding it was going to take for him to do it.
4 Maybe they get maybe some win on one issue, and then
5 they disclose it.

6 And, Your Honor, I don't think it's a good
7 faith position. I don't want to belabor it, because
8 there is more to say about other issues. But I
9 think this is significant. Because, for example,
10 giving the data to a Republican party, they think
11 that proves there is no viewpoint discrimination.

12 Our position here is identified with
13 conservatives, I think, and Republicans. But not
14 all Republicans agree with it. I don't think you
15 get a "get out of jail free card" for doing what you
16 did to VRF by giving it to the Republican Party,
17 because they have candidates running against the
18 Secretary of State. I just don't think that lines
19 up.

20 I want to -- I also want to point out --
21 and there is evidence of this in the record -- the
22 reason -- the initial reason the Secretary of State
23 gave for being upset with this is the threat of
24 misinformation. That's what Dylan Lange said to the
25 ProPublica reporter. That's what the Secretary of

1 State has hit over and over again. We've got all
2 the citations in the record. They're all in the
3 summary judgment case.

4 But I want to go to the question where I
5 think the Court is prepared to decide against us,
6 based on the legal analysis. And I want to hit this
7 issue. First of all, we really have three different
8 reasons the First Amendment should apply to a use
9 restriction. We have three different reasons.

10 Okay. The very first point is this: In
11 order to state a First Amendment claim on a
12 restriction regarding use, you don't have to show
13 that your right to access the information also came
14 from the First Amendment. You don't have to
15 trace -- you don't have to identify a First
16 Amendment right of access.

17 Now, what we have said is: In this case
18 we are resting on the right of access we get under
19 the MVRA and under New Mexico law, which separately
20 makes it available. So we have said that.

21 Now, I'm not saying there is no First
22 Amendment right to access. That's a harder question
23 that we don't want to get into here. We haven't
24 disclaimed that altogether. That's not our
25 position. But I think for purposes of your analysis

1 here, for your order, our right of access arises
2 from the New Mexico Code and from the MVRA, which
3 makes it available for the very reasons that we want
4 to use it. So we start with that.

5 Now, once you have a right to access the
6 information, then we pivot, and we say: Okay, what
7 are the restrictions on use and on speech with this
8 data that you have a right to engage in? So that's
9 the first way we get to the First Amendment, okay?

10 The second way is we look at what this
11 data is, okay? These are not pictures of White
12 Sands Missile Range. That's not what this is.

13 Remember what the defendants have
14 admitted. It's important. They've said that this
15 list is a powerful tool -- I'm quoting -- a powerful
16 tool for conducting political speech. They've said
17 the ban on sharing the voter file is a -- and I
18 quote this -- "a direct regulation on speech."
19 Those are admissions in the briefing of the
20 defendants.

21 And so, once you have that, we are in
22 Meyer versus Grant territory. That's the case that
23 started off in Colorado and got to the Supreme
24 Court. Colorado's initiative petition process went
25 to the Supreme Court a whole lot about 20 years ago.

1 And what those cases are about are restrictions on
2 the petition circulators. Now, what does that have
3 to do with the list here? Here's what it has to do:
4 So there were no content-based restrictions in Meyer
5 versus Grant. What Colorado said was: Look, we
6 don't have to give you the initiative petition,
7 right, the First Amendment doesn't require that.
8 But we've done that, we've given you this benefit.
9 Or really the citizens kept it for themselves.

10 All right. Now, here's how this process
11 is going to work: You've got to go gather
12 signatures on petitions, but you can't pay the
13 people who gather signatures. Colorado said, you
14 know, we're not even really regulating speech. This
15 is just a payment issue. That's all we're doing.
16 And by the way, remember, we didn't have to even let
17 you do initiative petitions. So this is really a
18 government-provided benefit. But the Supreme Court
19 said no. Once you are talking about the process of
20 speech, which is gathering signatures, you can't
21 unduly burden that process. And again, this isn't
22 commercial speech. This is political speech.

23 In Meyer versus Grant they wanted to
24 change trucking regulations in Colorado. Okay.
25 That's what we have here. So the very first point

1 we have, Your Honor, is that the use restrictions
2 heavily burden -- in fact, they completely take away
3 the avenue of speech that VRF is engaged in, which
4 is this crowd-sourcing method.

5 And I understand the Court believes the
6 First Amendment may not be implicated. But under
7 Meyer versus Grant, we don't have to start with
8 viewpoint discrimination. Now, we'll get there;
9 that's down the road. We don't have to start with
10 that. That's the first point.

11 The second point is something called the
12 unconditional -- Unconstitutional Conditions
13 Doctrine. Now, you'll notice -- what are the words
14 that counsel used a few minutes ago? She said: We
15 give a statutory right to access, but it's a
16 conditional right to access. Conditional right,
17 okay? It's a granting of a government benefit
18 that's access to the information. But we're
19 attaching strings.

20 Now, the Unconstitutional Conditions
21 Doctrine comes into play here, and not only where
22 it's a content-based restriction. I'm going to come
23 to that in a second, too.

24 But takings cases, for example, there
25 is -- every right in the bill of rights, basically,

1 can be triggered under this Unconstitutional
2 Conditions Doctrine. In takings cases it's Fifth
3 Amendment, Eminent Domain. And in those cases
4 someone says: Government, I want a benefit from
5 you. I want you to approve a permit for me to do
6 something special on my land here. And the
7 Government says: Okay, but you have to promise to
8 cede back, you know, a right-of-way for a park or
9 something like that. Well, that gets -- I mean,
10 that's a different area of law. Those are
11 unconstitutional conditions cases.

12 Those also exist here. In fact, the Court
13 cited a case like that, the Lanphere case from
14 Colorado, in the preliminary injunction decision.
15 That's a case where Colorado granted access to
16 criminal charging records. But it said: You can
17 have them, but you can't then turn around and use
18 them for purposes of commercial solicitations.

19 Now, the court there said: Look, there is
20 no Sixth Amendment right of access to these; there
21 is no First Amendment right of access to these.
22 However, we don't end this. Instead, this is
23 impinging on commercial speech. So we are going to
24 apply the commercial speech test under the four-part
25 test from -- I'm going to get it wrong here -- it's

1 not Pacific Gas -- but the four-part commercial
2 speech test. And we're going to decide whether
3 Colorado can stop people who get this criminal
4 charging data from doing commercial solicitations
5 with it. And they said, ultimately, it failed.
6 That's just intermediate scrutiny. It failed
7 intermediate scrutiny. But the key point here is
8 that it continued on and applied the First Amendment
9 test.

10 Sorrell versus IMS Health. That's not
11 just a Tenth Circuit case; that's a Supreme Court
12 case. That's a similar deal. It's another
13 commercial speech case. Again, that dealt with
14 data, it dealt with private companies getting
15 prescription data from pharmacies and then turning
16 around and using it to go market to the doctors who
17 prescribe things. Again, it's the same kind of
18 thing here, where we've got data that's being
19 extracted, and then there is a limitation on use.

20 The court there didn't say: Well, look,
21 we don't have to require that pharmacies make this
22 data available so the for-profit solicitors can go
23 buy it and then go solicit doctors. But we do. And
24 is it fair, then, to say that it can't be used for
25 commercial solicitation? Again, they applied

1 scrutiny there. There, they applied stricter
2 scrutiny. But they said no, it fails under the
3 First Amendment.

4 So look, I won't go much deeper there.
5 But the point is that deciding that there is no
6 First Amendment right to get so the data in the
7 first place does not end the analysis, it just
8 begins the analysis. And you don't have to find a
9 content-based or even a viewpoint-based
10 discrimination. You really need to, instead, find
11 is this list central? Is it really important for
12 political purposes and are they banning speech? And
13 if so, then you apply whatever level of scrutiny
14 applies. And we think it's strict. But that's
15 later.

16 Okay. One more point I want to raise:
17 So, so far we've said there is a right of access, so
18 you can start with that and then move into the
19 speech ban itself.

20 Second, we've said: Unconstitutional
21 conditions. We already covered viewpoint
22 discrimination, so I won't re-cover that. But there
23 is one more ground. So I guess I said there is
24 three; there is really four.

25 The other ground is a content-based

1 restriction on speech. Now, your Honor, this is
2 what is so doggone puzzling. Because we've asked
3 witnesses over and over again: Is what VRF does --
4 is that a governmental purpose? Okay? Is that an
5 election campaign purpose? And they'll go around
6 and around. And some witnesses say: Well, it
7 doesn't matter because you're engaging in
8 misinformation. Misinformation can never be a
9 governmental purpose. It can never be an election
10 campaign purpose. So, therefore, you're not using
11 it, VRF, for a permissible purpose.

12 Well, it looked like, once the lawyers got
13 back involved again the defendants said: No, no,
14 we're not going to fight you on that. It's really
15 all about putting it on the internet; that's really
16 the only issue here.

17 But if you look at their summary judgment
18 briefing and their response to our motion for
19 summary judgment, what do they do? They have
20 several pages, starting around pages 57 to 59, where
21 they go in and argue: This is not a governmental
22 use.

23 So we're back, again, to content-based
24 restrictions. The Government can use the data.
25 Governmental entities, they say, can use the data to

1 help critique the government and make it better.
2 Election campaigns can use the data for knocking on
3 doors. But entities like VRF, who care more about
4 the election itself, I guess, can't use the data.
5 So we do have a content-based restriction on speech.

6 And I don't think, as a defendant, you get
7 to keep changing your position over and over again
8 on whether it's content-based or not. So we have
9 that problem here. We have a content-based
10 restriction on speech. And we may yet, when they
11 come back up, hear them say: No, we disclaim that,
12 don't read that part of our brief; we're not arguing
13 that. But I mean, that was our first take here. We
14 thought that was the reason why they had a problem
15 with this. Not the internet issue. We thought they
16 believed that we didn't have the right kind of
17 content. And now, we're back there again.

18 And so, then, the final point would be
19 viewpoint discrimination. I won't re-cover that.
20 Those are four different routes to the First
21 Amendment.

22 Now, the next question is: What's a level
23 of scrutiny? I'm getting down the road here, but
24 this is important. Do you apply strict scrutiny
25 because it's a severe burden on political speech;

1 that is, our speech with everybody who says that
2 they agree with only using it for election purposes,
3 and they'll view our data, and they'll come back to
4 us or to the defendants, if they think there is a
5 problem? So do we apply strict scrutiny for that
6 reason under Meyer versus Grant? Do we apply strict
7 scrutiny because it's a content-based restriction?
8 Do we apply strict scrutiny because it's an
9 unconstitutional condition? Or do we apply it
10 because there is viewpoint-based discrimination?
11 Any of those reasons get us there.

12 Now, the other side has said: Well, you
13 really should use the Anderson-Burdick sliding scale
14 test. In election law, we kind of know what that
15 is. Sometimes something about the way the ballot is
16 constructed, the way voting occurs, even the way
17 voting registration occurs, is said to also get in
18 the way of free speech. And so what the Court will
19 do there is say: Well, okay, we do get to have
20 election procedures. We're going to look at the
21 magnitude of the burden. And then, if it's a low
22 burden, we'll do not much more than rational basis.
23 If it's a high burden, it's strict scrutiny.

24 So Anderson-Burdick is another way -- it's
25 sort of a sliding scale test that gets used

1 sometimes. We don't think it should apply here.
2 But if the Court does apply it, it still leads to
3 strict scrutiny.

4 The burden here is a complete ban on VRF's
5 model of crowd-sourcing this information. And if
6 you grant that there is a First Amendment right --
7 which the defendants have even said, the defendants
8 have even said: We recognize this is speech; they
9 think that the speech can be restricted -- but no
10 one disputes that this is political speech that is
11 going on. And so if that's correct, then you've got
12 to get to strict scrutiny.

13 And then this is where we get into the
14 narrow tailoring. The Court has already made
15 findings. You did it, Your Honor, because you were
16 looking at prior restraint. That's how you reached
17 strict scrutiny before. But if you do it again,
18 nothing has changed. They had an entire -- you
19 know, whatever this was -- six or eight or nine
20 months -- to come in and say: You know what, there
21 really are some burdens out there. We realize that
22 people are canceling registrations, people are being
23 harassed, all kinds of bad things are happening
24 because of what you've done, VRF.

25 Remember, they just speculated about this

1 last year. And the Court said: That's not good
2 enough for strict scrutiny. There is nothing new.
3 If you look at the record, they're still citing the
4 same few complaints. Most of them are from the day
5 or two after the Secretary of State issued a press
6 release attacking the Court's decision and attacking
7 VRF. And most of those complaints, if you look at
8 them, really take issue with VRF getting access to
9 the data. They say: Well, this is some
10 conservative group; that they're probably election
11 deniers. We don't want them having our data.

12 Well, they don't realize that VRF, were it
13 not for the problems in this case, would be able to
14 get the data. Republican Party can get the data.
15 The Secretary of State conveniently didn't note in
16 her press release that, by the way, the Republican
17 Party can get the data and can go use it, do its own
18 election audit if it wants to. They can knock on
19 your doors.

20 In the briefing, in the briefing, the
21 defendants even say, Your Honor: They say, if you
22 get -- you know, you don't have any injury here.
23 You don't really need to put it on the internet.
24 You can just take the data and go knock on doors
25 yourselves. They say that that's what VRF can do.

1 So all the injuries and harms that they
2 allege come from putting this on the internet are
3 things that can happen today. There is the selling
4 of data to vendors, to Catalist and I360. Do those
5 people -- do the customers of Catalist or I360 have
6 to sign an affidavit with the Secretary of State?
7 No. No, they can share with whoever they want to.

8 There are massive, massive gaps in this
9 system, if indeed the concern is that this is
10 private data that shouldn't be getting out. I mean,
11 they're out there. Each party has thousands of
12 people under the apparent policy we learned about in
13 this case, that if a party requests it, basically,
14 anybody with that party can go out and take the data
15 and go solicit, or whatever. I mean, this is out
16 there.

17 The real concern is not the data being on
18 the internet. If somebody wants to get the data
19 today, they can do it. If they want to find your
20 address, they can look at your property records.

21 The real concern is this crowd-sourcing
22 method. The real concern is VRF's speech. And so
23 this would fail strict scrutiny. It probably fails
24 intermediate scrutiny, if for some reason we could
25 fashion that under Anderson-Burdick. There just is

1 no reason to do this.

2 The Secretary of State is not even going
3 out and following up with the people who get the
4 data now to make sure they're complying with the
5 law. So there is no reason to single out VRF.

6 Your Honor, we also have overbreadth and
7 vagueness claims. I realize I spoke about three
8 times as long as my colleague did. So I'll stop if
9 there are questions.

10 THE COURT: Well, let me see what Ms.
11 Schremmer has to say in response, and I may have
12 some question.

13 Ms. Schremmer.

14 MS. SCHREMMER: Thank you.

15 Your Honor, I want to be very clear that
16 VRF is entitled to think whatever it wants. It's
17 entitled to advocate and criticize for whatever it
18 wants. But it is not being treated differently than
19 anyone else. The other entities that have obtained
20 data from the Secretary of State have done so by
21 making an explicit, affirmative, unqualified
22 promise, via affidavit, that they would not publish
23 this.

24 VRF wants the Secretary to accept,
25 instead, a very qualified and limited promise. And

1 it's not sufficient under state law as it currently
2 stands.

3 Now, it's possible that through the course
4 of this case, state law will change. But right now,
5 the Secretary has the obligation to enforce it as it
6 exists.

7 And so VRF is not asking for equal
8 treatment. They are asking for special treatment.
9 And that is something that the Secretary should not
10 provide to them.

11 Now, VRF has argued that everybody but
12 them --

13 THE COURT: What is the special treatment
14 they're asking for?

15 MS. SCHREMMER: That, instead of going
16 through the normal processes of getting voter data,
17 and promising that it would not use it for improper
18 purposes, that it has given a qualified promise,
19 subject to many exceptions, as to how it would use
20 the data.

21 Everyone else goes through a uniform
22 process and fills out an affidavit stating what it
23 will or will not do.

24 THE COURT: What did -- Mr. Greim said
25 that a couple of the entities that I think are on

1 the left side of the political did not fill out the
2 affidavit. That's incorrect?

3 MS. SCHREMMER: That's incorrect. His
4 point -- and tell me if I misstate it -- but his
5 point was that there is suspicion that a few of
6 those entities have sold their data to yet other
7 entities, and the recipient entities down the line,
8 rather than coming directly to the Secretary and
9 filling out an affidavit, received it through
10 Catalist or I360.

11 And to be very clear, the Secretary has
12 not disclaimed the ability to investigate and refer
13 for prosecution those entities. It's just there is
14 limited resources and there are only so many of
15 these cases we can have going at once. And the one
16 that posted data on the internet and put citizens in
17 fear for their safety happened to make the top of
18 the list.

19 And so I want to be very clear, Catalist
20 and I360 filled out affidavits. They went through
21 the proper processes. And there is an allegation
22 that they, then, later distributed that data -- not
23 on the internet, but in more private transactions --
24 that the Secretary has not yet had an opportunity to
25 fully investigate. So that was the reference there,

1 I believe.

2 THE COURT: And voter Reference has not
3 filled out the affidavit?

4 MS. SCHREMMER: To obtain the data that it
5 posted the first time, it went through Local Labs.

6 THE COURT: I understand. But for their
7 new request --

8 MS. SCHREMMER: For their new request, I
9 believe they did submit an affidavit. But they
10 submitted it attached to a letter qualifying the
11 affidavit: We stand by this affidavit subject to
12 this outcome in the case. If we lose the case, we
13 won't post it, basically.

14 THE COURT: But they did sign the same
15 affidavit that the leftwing groups signed?

16 MS. SCHREMMER: Yes. But the other groups
17 didn't attach a qualifying statement disclaiming
18 parts of the affidavit to the affidavit. And so
19 that's the difference, Your Honor.

20 And in terms of the claim that VRF has not
21 been able to use the data and other entities can,
22 that's simply not true. Again, I can't emphasize
23 enough -- and the testimony has been consistent in
24 this case --

25 THE COURT: They can't use it because they

1 don't have it.

2 MS. SCHREMMER: Sure. But if they would
3 agree not to publish it, they would have it, and
4 they would be able to use it, just like anybody
5 else.

6 If Catalist or I360 wrote a letter to the
7 Secretary saying: Please give us your data, we'll
8 put it online unless we lose this lawsuit we're
9 planning to file, it would have been the same
10 outcome.

11 And so there is no unequal treatment.

12 THE COURT: We really don't know that.
13 That would be speculation, wouldn't it?

14 MS. SCHREMMER: Well, that has been the
15 testimony in this case.

16 THE COURT: From?

17 MS. SCHREMMER: From the Secretary's
18 Office.

19 THE COURT: Well, but I mean -- but that's
20 just speculation; right? If those groups had said:
21 Hey, if we ever can print this stuff, or publish it,
22 we will, we don't really know that they would have
23 been treated the same way as VoterReference.

24 MS. SCHREMMER: Well, I guess we don't
25 know because it hasn't happened. VoterReference is

1 the only one who has done this activity. And that's
2 why it's not discriminatory. It is unique to a
3 unique situation.

4 And it's not on the basis of viewpoint or
5 content. Again, any --

6 THE COURT: Well, I was troubled, when I
7 did read over pages 57 and 58 of your brief, when I
8 did see the words "miscommunication," that did
9 trouble me.

10 MS. SCHREMMER: "Miscommunication"?

11 THE COURT: I think that's the word you
12 used.

13 MS. SCHREMMER: In the opening brief, Your
14 Honor?

15 THE COURT: Yes.

16 MS. SCHREMMER: Let me see if I can see
17 what we're referencing here. You said page 57?

18 THE COURT: Well, it was somewhere toward
19 the end of -- not the exhibits, but I thought it saw
20 again the words "miscommunication," as saying that
21 this was not a permissible purpose.

22 MS. SCHREMMER: I can't find -- are you
23 having any luck, Jess?

24 THE COURT: Do you know what page that is?
25 Or did I make that up?

1 MR. GREIM: Your Honor, I'm sorry, I'm
2 sorry to interrupt. But did you mean to say
3 "misinformation" instead of "miscommunication"?

4 THE COURT: Okay, yeah. And do you see
5 where the State used that language?

6 MS. SCHREMMER: If anyone can direct me, I
7 would like to look at that and address it. I can
8 say that there were comments from a communication
9 specialist of ProPublica that used that word. But
10 where it has really been highlighted by VRF is in
11 the referral letter from the Secretary of State's
12 Office to the attorney general -- and that's in the
13 context of an entire letter -- let me grab that
14 letter.

15 We ran a controlled find of the brief,
16 here, Your Honor, and the only places that we're
17 pulling that language are in Statements of Fact 41
18 and 42. And I think those are going to address what
19 I was just about to speak to, which is the referral
20 letter and the ProPublica article.

21 And this referral letter is two pages and
22 multiple paragraphs long. The bulk of the letter is
23 addressing the illegal transfer and use of the voter
24 data; that it was posted on a website that we
25 believe this was the source of the data that has

1 been transferred; that there was an executed
2 affidavit that has been disregarded; that it's being
3 made here under the section under criminal
4 violations. It cites Section 1-4-5.5, and it points
5 out that voter data shall be used only for
6 governmental or election and election campaign
7 purposes only. It then has a discussion of what
8 each of those purposes means. And it says: We do
9 not believe that providing personal voter data on a
10 private website intends to ascribe misinformation
11 about 2020 General Election meets the definition of
12 appropriate use as either for a governmental
13 purpose, election related, or election campaign
14 purposes.

15 And then it goes with another paragraph
16 about the unlawful use under New Mexico law. And
17 that we believe the transfer and publication of the
18 data is in direct violation of the Election Code;
19 that they have violated a prohibition against
20 providing voter data by posting New Mexicans'
21 private voting information online, or in Local Labs
22 case, by providing the voter data to VoteRef.com.
23 We also believe that VoteRef and Local Labs have
24 illegally used this voter data by publishing it on
25 VoteRef.com.

1 So the whole thrust of this letter is the
2 New Mexico Statutes and application of them to the
3 facts, and the concern with publication online.

4 THE COURT: What troubles me is that
5 misinformation is signaling that you disagree with
6 their conclusions; and, therefore, you're denying
7 them the voter rolls. It seems to me, that then, is
8 content discrimination.

9 MS. SCHREMMER: What is absent from this
10 letter is any concern about editorial comments from
11 VRF, or critical comments from VRF.

12 Your Honor, the airwaves are full of
13 people who are critical of the Secretary and of how
14 elections are being run and whether there is
15 election fraud.

16 THE COURT: I'm sorry, what is the
17 distinction you're drawing between misinformation
18 and what are you saying now?

19 MS. SCHREMMER: I'm saying that, to the
20 extent that this is viewed as misinformation, there
21 are many, many other entities who engage in similar
22 dialogues.

23 THE COURT: But why are you not giving
24 VoterReference this material?

25 MS. SCHREMMER: Because of the publication

1 to VoteRef.com. That's the one thing that comes up
2 throughout this letter, is publication to a website
3 of the actual voter data.

4 THE COURT: That's not what this letter
5 says. It says, "VoterReference.com is misleading
6 the public about New Mexico's voter rolls and are
7 perpetuating misinformation.

8 MS. SCHREMMER: Where are you getting
9 that, Your Honor?

10 THE COURT: Paragraph 41.

11 MS. SCHREMMER: That is not the referral
12 letter, Your Honor. That is a comment made to a
13 newspaper that sought comment from Mr. Curtas.

14 THE COURT: Isn't that evidence of content
15 discrimination?

16 MS. SCHREMMER: No, Your Honor, it's not.
17 Because this is not the reason for the referral.
18 And it's not the reason for the later denials. This
19 was a lengthy conversation that's reproduced in full
20 in the exhibits. And, yeah, it contains an opinion
21 about VoteRef.com's opinions.

22 THE COURT: But it seems to me it's
23 evidence of it. I know that you don't like the way
24 that was written, and -- but it's evidence of
25 content discrimination.

1 MS. SCHREMMER: But what is significant is
2 that Mr. Curtas is not a decision maker in denying
3 the data. He is not a decision maker.

4 THE COURT: He's --

5 MS. SCHREMMER: He's a spokesperson.

6 THE COURT: -- a spokesperson.

7 MS. SCHREMMER: Yes. And the evidence in
8 his deposition is he had wide latitude to speak on
9 behalf of the office. But the decision makers --

10 THE COURT: We know how public relations
11 people work: They talk, they listen, they sit in on
12 meetings, and then they go out and do their thing.

13 MS. SCHREMMER: But the decision makers --

14 THE COURT: I just think it's evidence.
15 And I think that's the reason, on the content and
16 also the viewpoint discrimination, that we have --
17 I'm not sure I'm the one that should decide that,
18 unless this is a bench trial. It just seems to me
19 it's evidence that either a jury or fact finder has
20 to listen to both sides and determine what was the
21 real reason for the refusal to give it.

22 MS. SCHREMMER: But the other evidence,
23 Your Honor, was that those who were decision makers
24 have testified --

25 THE COURT: But I'm afraid that puts me in

1 the position, if I'm the fact finder, then it's a
2 little different. But if it's a jury, it seems to
3 me you've just got to present your evidence to a
4 jury, not me.

5 MS. SCHREMMER: And I understand if all we
6 had was competing statements. But that's not all we
7 have. We have other entities who have made similar
8 statements.

9 THE COURT: I understand. But that still
10 puts me in a position of weighing the evidence. And
11 I guess that's the reason I'm not comfortable saying
12 I can grant your motion for summary judgment.
13 Because I would have to disregard other evidence. I
14 mean, that's even evidence you put in your brief.

15 MS. SCHREMMER: Right.

16 THE COURT: Then you load it up with their
17 own stuff that they want to argue.

18 MS. SCHREMMER: I think the position it
19 puts the Court in is weighing the standard and the
20 burden of proof. VRF on a retaliation claim has to
21 show, but for cause --

22 THE COURT: How do you envision this
23 getting resolved? If I determine there is a factual
24 issue -- which I think I basically said in the PI as
25 well -- I said it looked to me from the evidence I

1 had that it was likely than not that there had been
2 viewpoint discrimination. But now that we're
3 getting ready for trial, what do you think that
4 trial looks like? Does it have a jury?

5 MS. SCHREMMER: I would want to probably
6 do a little bit of research as to jury trial right
7 on these specific claims. Frankly, Your Honor, I'm
8 not sure that one exists. But before I commit to
9 that, I would want to investigate that further.

10 THE COURT: Well, I assume that this is
11 being brought under 1983, and they're seeking
12 injunctive relief. But on a fact issue like this,
13 sometimes we impanel a jury, and --

14 MS. SCHREMMER: And MVRA claims would not
15 be under 1983. They would be under that statute.
16 So this is why I kind of -- before I commit here,
17 I'd want to do a little thinking about what I think
18 might be a somewhat complex question.

19 THE COURT: Well, but the MVRA is
20 separate, I think, from what they are entitled to
21 under New Mexico law.

22 MS. SCHREMMER: Correct.

23 THE COURT: So the MVRA, you've got me
24 kind of going your direction on it. And I'm not yet
25 impressed with their access under the First

1 Amendment -- or not access, but their prior
2 conditions and those arguments. But I am thinking
3 that on this viewpoint discrimination and content
4 discrimination that a fact finder is going to have
5 to make that.

6 MS. SCHREMMER: Understood. And if we
7 could just kind of zoom out for a second, because I
8 want to make sure we're addressing everything that
9 is on the Court's mind. So we have the MVRA claims.
10 We have kind of a bucket of First Amendment claims
11 that relate to whether there is an inherent First
12 Amendment right to access or to use --

13 THE COURT: Well, I think they're saying
14 that in this case -- they're not giving it up for
15 all time.

16 MS. SCHREMMER: Right, right.

17 THE COURT: But in this case, they're not
18 pursuing a First Amendment right of access.

19 MS. SCHREMMER: Right. What I'm unclear
20 about is whether there is some lingering First
21 Amendment claim that they have the right to use
22 materials that they obtained --

23 THE COURT: It's not lingering. I mean,
24 it's on the table.

25 MS. SCHREMMER: Okay.

1 THE COURT: That is one of their claims.
2 But I'm also saying I wasn't inclined to grant that
3 at the PI stage. And I'll listen and deal with it
4 now that I have more time than I did with the PI.
5 But I'm not inclined there.

6 So of their four theories, First Amendment
7 theories, the two that I'm not inclined to grant and
8 viewpoint discrimination. Those are the two I see
9 kind of barreling toward trial.

10 MS. SCHREMMER: Right. And I understand
11 that. I want to make sure if we're still kind of
12 working through New Mexico's regulations on use, if
13 those still need to be discussed.

14 THE COURT: Go ahead. I don't mean to cut
15 you off.

16 MS. SCHREMMER: Well, not at all. I want
17 to make sure that I'm addressing anything that is
18 still an open question.

19 THE COURT: Well, I'm going to have to
20 decide it. So if you've got something to say --

21 MS. SCHREMMER: Retaliation is a little
22 bit different, as Your Honor mentioned. And I do
23 think it's important to remember that, you know,
24 this is for prospective injunctive relief only.
25 That's how we are here representing a state entity

1 in federal court, despite the Eleventh Amendment.

2 And so, even if they can show there was
3 some retaliatory motive in what has happened
4 previously -- which we obviously dispute -- the
5 question is what happened going forward. Because
6 that's the relief they're seeking is what can the
7 State do going forward.

8 And what I think is crucial is that the
9 State is able to regulate the use of the data that
10 it has used its governmental powers to collect. And
11 to make sure that when I Google, or I put my name
12 into VoteRef.com, my entire date of birth and home
13 address doesn't come up -- which it currently does.
14 And that's not a First Amendment issue. That's not
15 a retaliatory issue. That's not a content or a
16 viewpoint issue. I don't even believe it to be
17 constitutionally protected speech, for all the
18 reasons we've been through, with no right of access
19 and the conditional nondiscriminatory grant of
20 information.

21 But even if it is, that only, as Mr. Greim
22 pointed out, brings us to the question of what
23 levels of scrutiny.

24 And here, as you all were discussing at
25 the PI hearing stage, the Court noted a lack of

1 evidence.

2 THE COURT: Ms. Schremmer, I've let time
3 get a little bit away. I need to give Ms. Bean a
4 break. Let's take a 15-minute break, and come back
5 and let you finish your argument.

6 MS. SCHREMMER: Okay, thank you.

7 THE COURT: We'll be in recess about 15
8 minutes.

9 (The Court stood in recess.)

10 THE COURT: All right. Ms. Schremmer, if
11 you wish to continue your argument on the First
12 Amendment issue.

13 MS. SCHREMMER: Thank you, Your Honor.

14 I want to clarify something real quickly,
15 because I could tell I inspired a little confusion
16 when I mentioned my information being on
17 VoteRef.com. That's because I was registered as a
18 voter in Kansas. And so, you go there today, you
19 still have my full prior address, my full birthdate,
20 month, date. But not because -- and I could tell I
21 sparked some concern. New Mexico data is not up
22 there presently because of the protections that the
23 State has taken here.

24 But, in general, there are hundreds and
25 thousands of full birthdates still on VoteRef.com

1 today, including my own. And so I wanted to clarify
2 that, so it didn't seem I was misstating anything.

3 THE COURT: How many states fall into --
4 like Kansas -- where all this information is
5 available on the internet?

6 MR. GREIM: Your Honor, I could get that
7 answer. But I don't know -- I don't know which of
8 those have it and which don't. Well, we're on the
9 website. But all we can tell from this immediately
10 is which states we have. And there look to be about
11 maybe 30 states, 32 states. Of those, I'm not sure
12 how it breaks down.

13 THE COURT: What are you looking at? You
14 said this is states that you have this information
15 for?

16 MR. GREIM: Sure. And Your Honor, we're
17 on VoteRef.com right now, on the internet and,
18 right, the states that are darkened in red are all
19 the states where it's posted. And the ones that are
20 white it is not posted. But you've got to click on
21 the actual state to see what they've allowed there,
22 and then what the description of the law of that
23 state is, on how you could use it and things like
24 that.

25 So Matt, Mr. Mueller, just clicked on our

1 home state of Missouri, and it looks like the
2 registered addresses were -- he took it away from
3 me -- were X'd out, but the date of birth is on
4 there, and then the registration status. And in
5 Missouri, we don't have party affiliation. So it
6 depends on what each state allows.

7 THE COURT: But there is about 32 states
8 that allow some form of the voter list?

9 MR. GREIM: That's right.

10 THE COURT: Go ahead, Ms. Schremmer.

11 MS. SCHREMMER: Thank you.

12 Just returning very briefly -- and I'll
13 wrap up here on First Amendment issues -- I
14 understand that Your Honor is not inclined to grant
15 judgment on retaliation. And I completely
16 understand that.

17 What I want to focus on is the validity of
18 New Mexico's law. So even if the Court were to find
19 that in this case the law was misapplied in some way
20 that was viewpoint discriminatory, I think the most
21 important point is that New Mexico's regulation of
22 the use of this data is not inherently
23 discriminatory, and it does not run afoul of the
24 First Amendment.

25 The regulations don't get to protected

1 activity, because there is no First Amendment right
2 to take information that you didn't have a First
3 Amendment right of access to, and put it on the
4 internet.

5 And even if that were somehow
6 constitutionally-protected activity, it would
7 survive scrutiny, whether that's under the Anderson
8 Burdick test, or under strict scrutiny.

9 And the conversation a moment ago related
10 to the preliminary ruling back last year about lack
11 of evidence as to compelling interests.

12 But since that point, the parties have
13 engaged in discovery. And there is substantial
14 evidence of the very concerns that New Mexico has
15 raised throughout this litigation, including voter
16 participation, citizen safety, protection of home
17 and address, and personally identifying information.
18 These are all recognized, important, compelling
19 state interests. And they're supported in this case
20 by the record.

21 New Mexico's information was online for a
22 very short span of time. Yet in that span of time
23 it generated many, many complaints, including
24 citizens asking how they could get deregistered to
25 vote, so as to protect their information. And I'd

1 encourage the Court to look at those complaints.
2 They're not the hate mail that Mr. Greim described.
3 They are people saying: I'm being stalked by my
4 ex-partner. We have a mentally unwell son who has
5 threatened to kill us. I'm a law enforcement
6 officer. We also have a affidavit that was
7 submitted to the Tenth Circuit about the Secretary
8 being contacted by the marshal service and by court
9 employees. It is a huge problem. And New Mexico
10 absolutely has a compelling interest in protecting
11 the personal information of all of its citizens,
12 including its parole officers and police officers,
13 its judges, its marshals.

14 THE COURT: Would you agree with me that
15 if a lot of states are not concerned about this, and
16 they're allowing this information to go unrestricted
17 on the internet that it reduces your argument that
18 these are compelling state interests?

19 MS. SCHREMMER: No, Your Honor, it does
20 not, because these interests have already been
21 recognized.

22 THE COURT: These might be sort of unique
23 interests and special interests. But at least, in a
24 constitutional analysis, if a whole bunch of states
25 don't care about this, I wonder whether a state can

1 come in and say their unique and special is
2 compelling under the Constitution.

3 MS. SCHREMMER: Well, first, Your Honor, I
4 don't think the record reflects that other states
5 don't care about this. I don't have information
6 about complaints that might have been received in
7 other states, and legislation that may be in process
8 in other states, and lawsuits that may be in other
9 states.

10 I suspect that there is more than one
11 VoteRef out there, but I don't know, because I don't
12 represent VoteRef. I only represent New Mexico.
13 And the Tenth Circuit and the Supreme Court has
14 already recognized these items as compelling
15 interests. Items like voter participation, one of
16 the most fundamental and jealously guarded rights
17 under our Constitution. We know from what has
18 happened in New Mexico that VoteRef poses a risk to
19 that. And we know that New Mexico's regulations are
20 aimed at mitigating that risk. And they do so in as
21 narrowly tailored of a way as possible.

22 Again, there would be no issue with
23 publishing anonymized data. You know, if the names
24 were replaced instead with numbers, or some way that
25 an ex-partner couldn't search you and find where

1 your new address is, or a con-artist couldn't look
2 up and find your birthdate and use that in some kind
3 of phone scam.

4 There are aggregated ways of looking at
5 this data. There are safeguards that could be used,
6 where VoteRef could still do the work that it wants
7 to do without publishing the wholesale voter data.
8 And so that's a very limited regulation of a very
9 dangerous use. And it speaks to an extremely
10 compelling state interest of voter participation, to
11 say nothing of the safety concerns which fall
12 squarely with the State's police powers to ensure
13 the safety of its citizens, especially when that
14 safety is related to their exercise of their
15 constitutional right to register and to vote.

16 And I don't wish to belabor the point,
17 because I think we're all familiar with the strict
18 scrutiny analysis. But that's significant evidence
19 that is different today than it was at the PI
20 hearing. It does speak strongly to New Mexico's
21 interests and the compelling nature of that
22 interest.

23 THE COURT: Well, you know, I think
24 everybody is struggling to figure out what the level
25 of scrutiny is. But I am concerned that, you know,

1 if a state has a unique interest that other states
2 are not recognizing, that it time weakens your
3 compelling state interest average argument. It may
4 flounder on a strict scrutiny test. It may be a
5 winner from its rational basis, I think it would be.
6 But I think it may depend very heavily upon what we
7 conclude the appropriate level of scrutiny is.

8 MS. SCHREMMER: Well, and two points, Your
9 Honor. One, I do think we're at a rational basis
10 test, because this is not constitutionally protected
11 activity. It might be different if there were some
12 First Amendment right to access this information,
13 but there isn't. There is no First Amendment right
14 of access. So this is information that has been
15 granted to VRF by state law or by statute on the
16 condition that it not be misused in this way.

17 In addition, there is no conflict between
18 state law regulating it and any law that might give
19 access. Because use, again, is different from
20 access. And so I very much think we are in rational
21 basis land.

22 But I wanted to address the other scrutiny
23 arguments just to be safe. And on that point,
24 VoteRef is a very new organization. This is a very
25 new website. I don't want to misstate it, but I

1 think 2019, 2020. This is not something that has
2 been around for decades, where litigation has been
3 able to fully percolate. This is a new issue that
4 states are figuring out what to do with in a very
5 real, on-the-ground way, and the fact that this is
6 one of the earlier pieces of litigation does not at
7 all negate the strength of New Mexico's interests,
8 especially where that interest has been recognized
9 in all types of different contexts by the Tenth
10 Circuit and the Supreme Court.

11 THE COURT: All right. Anything else,
12 Ms. Schremmer?

13 MS. SCHREMMER: Not on that point, Your
14 Honor. If the Court wanted me to go ahead and
15 address overbreadth or vagueness at this point, I
16 could.

17 THE COURT: Why don't we pause here. Let
18 Mr. Greim have the last word on the First Amendment
19 issues.

20 MR. GREIM: Thank you.

21 THE COURT: Let me ask some questions that
22 I asked of Ms. Schremmer. You initially said that
23 you thought we were going to have to have a trial on
24 this, and that you were prepared to do a one-day
25 trial or something like that. But when they filed

1 their motion for summary judgment, you decided to
2 file yours.

3 What do you think about my thoughts about
4 the fact that I'm troubled about me being the one
5 that decides, for example, the issue: Did you do
6 the same thing as the other people, and give an
7 affidavit, and the State saying yours is qualified,
8 that, and also whether they're engaged in content or
9 viewpoint discrimination; that those seem to me to
10 be factual issues that I shouldn't be deciding on a
11 summary judgment. What do you think about that?

12 MR. GREIM: Sure.

13 Your Honor, I've dealt with -- it seems
14 like this happens in a lot of the sort of cases that
15 I do, not necessarily for VRF, but they're speech
16 cases like this. We're trying to be efficient for
17 the parties who are involved. These are not
18 corporations with billions of dollars at stake. So
19 we're trying to do things efficiently. And
20 candidly, what I usually prefer to do, just in case
21 the judge does think that maybe it's more of a
22 finding of fact than a summary-judgment-type basis,
23 is to do what a summary judgment argument turns into
24 anyway, which is we're citing to evidence.

25 Usually, everyone has been deposed;

1 sometimes people have testified multiple times, and
2 we've got, you know, deposition designations, and,
3 you know, just to be very clear, there is no jury
4 trial here. We've not asked for one, no one is
5 asking for money damages. We're asking for
6 declaratory injunctive relief and attorneys' fees.
7 But, you know, this was always going to be a
8 bench-tried case. So that's why I prefer to do it
9 that way. It's also less paper, it's less work
10 briefing.

11 But once one side moves for summary
12 judgment, and as I look through the record, to me
13 there are no weighing of credibility issues. And I
14 could get into a few of the points you've raised,
15 because I've been listening closely over here. But
16 we don't think a jury trial should happen. Nobody
17 assumed there would be a jury trial. We've always
18 assumed there would be a bench trial in this case.
19 And I would still have preferred to have done that.

20 But given the enormous amount of time that
21 we've spent -- you've seen in the papers -- on
22 summary judgment, to me it is appropriate, because
23 the record of who did what is clear. The record of
24 why people did what they did exists in their
25 deposition transcripts. We have that. I got --

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1 there is a little hint just now of, well, the
2 statements of Alex Curtas, the information director,
3 they're just sort of his; they're not on behalf of
4 the Secretary of State's Office. We've addressed
5 that in the papers. And you'll see that his final
6 statement to the ProPublica reporter, which is not a
7 newspaper; it's a progressive media outlet says:
8 This is the crux. And he quotes from Sharon Pino's
9 letter, he quotes from Pino's letter. I mean, they
10 stand by the Pino letter. No one is backing away
11 from that.

12 And he uses the content-based criteria.
13 He says: We do not believe this personal voter data
14 on a website that intends to spread misinformation
15 about the 2020 general election meets the definition
16 of appropriate use, as either for a governmental
17 purpose, election related, or election campaign
18 purposes. He said that's the crux. He didn't just
19 make that up. He took it from the referral letter.

20 And then remember, Your Honor, we quizzed
21 Ms. Pino about that letter in open court. We've got
22 the transcript. And we cited it. And we gave her a
23 chance to talk about that. And she said, to this
24 day, in open court, she said: I do not believe that
25 misinformation is a governmental purpose, election

1 related, or election campaign purposes.

2 So there is no daylight in between the
3 defendant's different witnesses here. I mean, I
4 think, when you go through the record, as you line
5 these facts up, Your Honor, you're going to see that
6 we might disagree about what conclusions you ought
7 to draw from the facts. But there is not going to
8 be a situation where you've got to truly put your
9 hat on as fact finder.

10 So I continue to urge you --

11 THE COURT: But isn't that an important
12 role of a fact finder? If it's going to be me, and
13 it sounds like it's either going to me in a summary
14 judgment, or it's going to be me as a fact finder,
15 isn't that an important role for a fact finder to
16 draw reasonable inferences? I mean, somebody has
17 got to eventually say there was either viewpoint
18 discrimination or not viewpoint discrimination.

19 MR. GREIM: That's right.

20 THE COURT: And that's an ultimate fact.
21 But somebody has got to make that call.

22 MR. GREIM: Well, there are plenty of
23 evidentiary facts. But as you go through the
24 papers -- I mean, you'll be able to see what's
25 actually disputed. I mean, there is no dispute that

1 anybody said any of these things. Nobody says:
2 Well, boy, I was quoted that way, but I'm not sure I
3 said that. There are no issues like that. So --
4 and again, we're talking about not the intent in the
5 head of the Secretary of State, but the office here.
6 And we see them all --

7 THE COURT: Let me ask this -- and Ms.
8 Schremmer touched on it -- if you're not seeking
9 damages, you're seeking injunctive relief, what
10 difference does it make if a while back they engaged
11 in content or viewpoint discrimination? They may
12 have goofed up, made a mistake. But if you're
13 asking for injunctive relief, what difference does
14 it make?

15 MR. GREIM: Well, there is a couple of
16 things. One, we're really we're looking at two eras
17 of conduct here. Recall, we did have the
18 information posted briefly, from December through
19 March, when the ProPublica story came out, of 2021
20 to 2022. Then we had it posted again after the
21 preliminary injunction and before the stay.

22 Now, the defendants -- we have asked them,
23 we've said, you know: Are you going to prosecute us
24 for violating the law based on what we've already
25 done? And I think the Court even asked this at the

1 stay hearing. And they won't say that they won't.
2 They said: Well, there is a Rule of Lenity. You
3 know, you can always kind of argue that the statute
4 could be read different ways. But we're in federal
5 court. They've threatened prosecution for what
6 we've already done. So --

7 THE COURT: How does going to trial or
8 making a ruling on viewpoint discrimination or
9 content discrimination, how does that help you on
10 that score?

11 MR. GREIM: Okay. One way on that score,
12 on another way going forward.

13 On that score, I think a finding of
14 viewpoint discrimination in the referral, which the
15 Court did find on preliminary injunction. Okay?
16 And also content-based discrimination in the way the
17 ban is set up. Again, this is under the old
18 statute. That's another issue.

19 I think a fair remedy is that we cannot be
20 prosecuted -- or really, declaratory relief would be
21 sufficient. I don't think you need to enjoin them.
22 I think declaration is enough -- and often in 1983
23 cases it is enough -- that we cannot be prosecuted
24 for our posting of the data, either before the
25 lawsuit or in reliance on this Court's order. I

1 think that's part one.

2 Part two is they can no longer deny us
3 access to the data based on this lingering fear that
4 we're going to put it all on the internet.

5 Remember, one of the reasons they said
6 that they couldn't ever tell us again -- their
7 testimony at deposition is not what we heard here
8 today. They said they could never tell us when it
9 would come on again, in part because they were
10 concerned that we posted the data in reliance on the
11 Court's order. Okay? And I remember asking this:
12 When is the shadow of our prior posting ever going
13 to drift away and you're willing to listen to us
14 when we say we're not going to do it without a court
15 order? And you know, they can't tell us that.

16 We need a declaration of rights saying
17 that, if we agree to what's required under New
18 Mexico law, you can't keep holding our prior speech
19 against us, denying our access. So that's what this
20 does.

21 Now, going forward -- there has been past
22 viewpoint discrimination. There has been no showing
23 that: Gosh, we made a mistake, we're sorry, you
24 know, we don't think there is a problem here
25 anymore. There has been nothing of that from their

1 witnesses. But the other question is this law has
2 been amended. Now, it says there can't be internet
3 posting. I mean, we are asking for a declaration
4 that that ban violates the First Amendment, for all
5 the reasons we just stated.

6 And then overbreadth, I know we've broken
7 it off with vagueness to address later, but our
8 argument there is the same. So we are asking for
9 the right to be able to receive the data when we
10 make requests. And we're asking for the right to be
11 able to post it on the internet under the conditions
12 that we use right now, which is not just it's there;
13 it's that somebody has to go on, see what New Mexico
14 law requires, and click that they agree.

15 They may want to say that's not good
16 enough, we don't trust that. But the record should
17 be clear that that's actually what we do in New
18 Mexico and every other state. That's in the record.
19 There is nothing disputing that.

20 And I don't want to get too far. I know
21 you asked a specific question. But I just want to
22 clarify what we do is really not different from what
23 other requesters do when they approach the Secretary
24 for the data.

25 Now, the Secretary says they can enforce

1 for filling out a false affidavit. VRF can't go do
2 that; right?

3 But for purposes of tailoring and
4 scrutiny, it's really interesting that the process
5 that we have to protect against misuse of the data
6 is really not different in a material way from what
7 the Secretary of State does now.

8 Again, remember that they say the marshals
9 were concerned, and all these people. We believe
10 that's all hearsay. We don't have those
11 communications. But the status quo right now is
12 that, when the party requests, the Democrats or
13 Republican Party requests the data, they can share
14 it with every separate campaign that's running for
15 whatever office it is, that says they're a
16 Republican or a Democrat. And those campaigns can
17 share it with their people. I mean, we're not under
18 a tight lock system right now. We don't have that.

19 When we think about state interests, you
20 know, the interest in privacy and integrity of
21 elections, we're not running under a system where
22 this is kept under lock and key, not by any means at
23 all. There is not a mere suspicion that Catalistist
24 and I360 are sharing the data with others. We have
25 record evidence on that. And the Court made a

1 finding on it even before we had the additional
2 evidence last year. So this is not a mere
3 suspicion. This is what's actually occurring.

4 One more thing -- Your Honor, I've gone
5 way behind your question. I have a few other points
6 I want to move to here.

7 THE COURT: Okay.

8 MR. GREIM: I want to make clear that
9 while we've got 32 states online, we're getting data
10 from many more of those. But those states may have
11 an issue with internet publication or the law looks
12 to be unclear or there has been a threat of some
13 kind, so we are holding off until basically
14 litigation or maybe a change in law that would allow
15 us to do it. So I want to be really clear on the
16 record. We're getting data under the MVRA from
17 certainly more than 32 states. Those are the ones
18 where we get the data and post parts of it online.

19 I want to end maybe with this point on the
20 data on strict scrutiny. I think this is really
21 important. The statement was made: We know VRF
22 poses a risk; that this is as narrowly tailored as
23 possible; that con-artists can go use birthdates
24 that are up online, when we come back online.
25 Birthdates have never, ever, ever, been posted in

1 New Mexico. Now, in Kansas it sounds like thy were.
2 That was interesting to hear that. But not in New
3 Mexico. So New Mexico can't rely on that interest
4 here.

5 But the other issue is there is no
6 evidence that that was occurring. People write in
7 and say they're worried: Oh, they want to cancel
8 their registration, which appeared in only a
9 couple -- I encourage the Court to read the record,
10 too, because you'll find that there is no more than
11 about two dozen comments -- and that might be
12 overstating it -- that the Secretary of State gave
13 and this VRF gave when people reached out to VRF.
14 And they're clustered around the timeframe of the
15 Secretary of State's press release. The law
16 enforcement officer who reached out to VRF, that was
17 mentioned there, we removed his information from the
18 website when he showed who he was. I mean, when
19 we're under strict scrutiny, you don't have to take
20 the law as it stands either.

21 There is a Safe at Home Program here in
22 New Mexico. There is nothing stopping -- want to
23 talk about narrow tailoring -- there is nothing
24 stopping New Mexico from saying: Okay, court and
25 judicial officials, we are not going to make that

1 data available to anyone. There is nothing stopping
2 New Mexico from doing that or from tailoring it in
3 some better way.

4 They could tell VRF: Look, okay, you can
5 share with people through your website when they
6 click that they're going to follow the law. But we
7 want you to now take their information and keep a
8 log, just like we do at the Secretary of State's
9 Office. We know that you don't have control over
10 what they ultimately do. They could be lying to
11 you, just like people could be lying to us at the
12 Secretary of State's Office.

13 But if there is an identity theft that
14 occurs, or there is some solicitation that occurs,
15 we'll now know where to go to get the list, which is
16 all that they do right now anyway.

17 And so I just want to make really clear
18 what's actually at stake in this case. It's much
19 more about cutting down this form of speech. And to
20 be very clear, there has been no contest in this
21 case that what we do when we share the data with our
22 users is speech. There has been a contest about
23 whether it violates the First Amendment to restrict
24 it. No one disputes that that's speech. It's
25 uncontested. This case is more about shutting that

1 down, and less about protecting privacy interests
2 that are already -- if the State's really worried
3 about it -- you know, being compromised by the
4 sharing with all the people who get access to it
5 now. Thank you.

6 THE COURT: Well, but when you make those
7 concessions, it seems to me you're undercutting your
8 argument. Because, if they can restrict this,
9 they're saying they could restrict more. And where
10 is the constitutional basis for saying: Well, this
11 is constitutional, they can restrict this, but they
12 can't totally ban it?

13 MR. GREIM: I see what you're saying, Your
14 Honor. But that's the inherent problem with narrow
15 tailoring. I mean, that's the analysis that narrow
16 tailoring looks towards.

17 THE COURT: But by making that argument,
18 if we're talking about narrowly tailoring, you're
19 conceding that these are compelling state interests.

20 MR. GREIM: Well, Your Honor, what I'm
21 saying is, if we hold the state interest, arguendo,
22 we hold it as something that they've argued and only
23 focus on narrow tailoring, okay, if we're going to
24 treat those, for purposes of the second prong, as
25 having been established, look at the other things

1 you can do. So I guess I should be clear, I have
2 not conceded they should go do those things. I'm
3 saying, if they're so worried about these issues,
4 look at the other things they could do that are
5 narrower.

6 Now, at some point that's the narrow
7 tailoring analysis. But courts don't just give up
8 on narrow tailoring because we've marched two steps
9 out of 100 that would go back to taking the right,
10 you know, altogether away. But here, they've oddly
11 mentioned judges, courts, and law enforcement
12 officer.

13 They have a Safe At Home Program already.
14 My point is we're not stuck with that.

15 THE COURT: What is the Safe At Home
16 Program?

17 MR. GREIM: It's people who establish that
18 they meet certain criteria can have -- and I'm going
19 to rely on them to answer this more specifically.
20 But they don't have their actual address listed in
21 there. They have something else.

22 THE COURT: On the voter list?

23 MR. GREIM: On the list. So, when we get
24 it, for those people who have -- and it's not just
25 anybody who says: I'm concerned. You have to be

1 able to establish certain criteria. So if we got to
2 a point where the Safe At Home Program --

3 THE COURT: I was looking at one of a
4 judge that had their chambers listed there. How
5 does anybody use that to determine whether they're
6 qualified to vote in a particular state or
7 legislative district?

8 MR. GREIM: Well, that's interesting. I
9 don't remember seeing a judge's chambers listed as
10 their residential address. I actually don't know
11 the answer. That surprises me that the voter roll
12 has the judge listed at their chambers. But it may
13 be that that's allowed.

14 When we look at the purpose of our speech,
15 of making sure that the voter rolls are properly
16 kept, the people who are judges are a small part of
17 the population. People who can show that they're
18 being stalked, that's a small part of population.

19 We don't concede our overall point by
20 allowing the state to come back and say: Okay,
21 we've got this narrow interest. I mean, if you
22 really believe that that's a big problem here, then
23 you could actually pass a law that's narrowly
24 tailored to address that interest, and not
25 completely ban -- not just internet speech, but any

1 sharing of the information outside the organization.

2 Internet speech was just added on as a
3 specific category recently. But before, remember,
4 they relied on the ban on any sharing. And that's
5 the ban that's still at issue here. So, I mean,
6 they're taking their claimed interest and they are
7 inflating it to completely block an avenue of
8 communication. And those things fail strict
9 scrutiny. And there may be some better answer for
10 the state. But they're not even trying here.
11 They're not even trying to come back. They're just
12 saying, no, the ban is all we can do.

13 THE COURT: All right. Thank you, Mr.
14 Greim.

15 Ms. Schremmer, do you want to go to
16 overbreadth and vagueness?

17 MS. SCHREMMER: Thank you, Your Honor.

18 Those overlap here, and I think it is
19 worth mentioning that strict scrutiny does not, as
20 you know, require the least restrictive means
21 possible. It only requires a close match between
22 means and ends. And we have that here. And if, for
23 no other reason, that's the reason that this law is
24 not overbroad. Just because there is some
25 hypothetical set of circumstances in which a person

1 could come up with an overbroad application, that is
2 insufficient to get rid of a law entirely on the
3 basis of overbreadth.

4 More importantly, overbreadth is meant to
5 protect First Amendment rights. If there is no
6 right to access under the First Amendment, then
7 there is no overbreadth issue in this case. It's
8 not a legitimate means to protect some statutory
9 right under the MVRA or otherwise.

10 And so where there is no right of access
11 under the First Amendment, and the specific activity
12 that we're talking about here, we maintain is not
13 constitutionally protected, these laws can't be
14 overbroad.

15 And neither are the laws vague. The laws
16 have never been vague, and Your Honor found as much
17 at the preliminary injunction stage. But, even if
18 they were, they're only further clarified by the
19 recent enactment of House Bill 4, which makes
20 extremely clear, which should always have been clear
21 which is that no sharing outside of the person who
22 requested it inherently means no sharing to the
23 worldwide web, is now reduced to very explicit
24 language within the statute.

25 THE COURT: Doesn't that in some ways hurt

1 your argument? Because under statutory construction
2 rules and principles and canons, if you're saying
3 that the new act means nothing, because it always
4 existed, that would not be a proper statutory
5 construction, would it? It has to be that the new
6 law changed the law. And so you were not on good
7 grounds for your interpretation, which is one of the
8 things I also found in my PI, that you were -- the
9 interpretation the Secretary was giving was simply
10 not there. Now, I said I didn't know if that made a
11 lot of difference to a federal court. It might be
12 of interest to the state court. But now that the
13 legislature has gone back and given the Secretary
14 what she wants, doesn't it undercut that you didn't
15 have that authority earlier?

16 MS. SCHREMMER: Two points in response to
17 that, Your Honor. The first is that the new law
18 merely clarifies the old. And so --

19 THE COURT: That's what they always say.
20 But the rules of statutory construction don't say
21 that. That would make the new act a total nullity.
22 It doesn't do anything. And that's not the rules of
23 construction that we use.

24 MS. SCHREMMER: Well, I don't think that's
25 correct, Your Honor, in this case. And so

1 previously --

2 THE COURT: Can you cite to me a case that
3 says: When a legislature or congress passes an act,
4 it means nothing, it's simply was clarifying what
5 the department secretary thought was the law?

6 MS. SCHREMMER: No, Your Honor. But
7 that's not what happened here. This would be more
8 akin to there being some phrase that was unclear
9 within the statute, arguably; that there was
10 litigation; a court found that, no, it's not
11 unclear, this interpretation is correct, and then
12 the legislature going in and using the Court's more
13 refined language, so that there can never be another
14 debate about it. That doesn't mean the
15 long-standing interpretation was somehow not the
16 correct interpretation of the law.

17 And more specifically, what happened here
18 is that previously Section 1-4-5.6 used to
19 incorporate by reference the Voter Records System
20 Act. And this House Bill 4 takes that same language
21 from the Voter Records Systems Act, and now places
22 it directly within 1-4-5.6. So rather than
23 incorporating by reference another statute, it moves
24 that same language into the statute, and makes
25 explicitly clear, in this digital age, that this

1 also encompasses online posting.

2 So I don't think that makes the prior
3 interpretation incorrect or vague. But even if it
4 did, turning to my second point, again, the relief
5 here is only prospective and injunctive. And so the
6 question is now whether the statute is vague going
7 forward. And it is most certainly not, especially
8 as it is now written.

9 And so vagueness is a way to facially
10 attack an entire law. And there is no vagueness at
11 this point. We maintain there never was, but even
12 if the Court finds against on that, going forward
13 the law is clear, and it's not subject to facial
14 attack on the basis of a vagueness argument.

15 THE COURT: All right. Anything else on
16 those two points, Ms. Schremmer?

17 MS. SCHREMMER: No, Your Honor, other than
18 we all know the difference between a massive online
19 publication and other means of distributing
20 information. There is a reason why, when we file
21 with this court, we have to redact birthdates and
22 the full names of minor children and the victims.
23 And it's because the power to access and misuse
24 information on the internet is so much vaster.

25 And so the State's interest in protecting

1 voter participation and citizen safety has to meet
2 that digital age demand. And here, New Mexico is
3 doing it in the most tailored way possible. And so,
4 again, we don't think that we are at a point of
5 applying strict scrutiny, because we don't think
6 there is a First Amendment right to publish. But
7 even if we are, we believe that strict scrutiny is
8 strongly met.

9 THE COURT: Thank you, Ms. Schremmer.

10 Mr. Greim. On that last point that Ms.
11 Schremmer raises about the new act, it's pretty
12 clear -- putting aside all your constitutional
13 issues -- just from a statutory standpoint, New
14 Mexico now has banned what you want to do. Would
15 you agree with that?

16 MR. GREIM: I would agree that they -- I
17 will say that it's clear that you can't post it on
18 the internet, make it publicly available on the
19 internet, which is I know what they think we do.

20 Now, it gets more complicated beyond that.
21 That would be a different lawsuit. But, for
22 example, you know, if we wanted to have each person
23 who wanted to view our data pay \$5, and become a
24 member of VRF, and view it then, is it still
25 publicly available on the internet? You know, does

1 that even count as sharing it outside of VRF,
2 because, remember, that's the principle --

3 THE COURT: But that's not what you want
4 to do; right?

5 MR. GREIM: Well's, it's not what we're
6 doing right now, that's true. We don't charge
7 anyone.

8 THE COURT: And so what you want to do is
9 what you've done twice before. And would you agree
10 with me that the new act is pretty clear that in New
11 Mexico you can't do that.

12 MR. GREIM: Yeah, I would agree that prong
13 two makes that clear.

14 THE COURT: Prong two being --

15 MR. GREIM: So if you look at the new law,
16 it's 1-4-5.6. They actually -- before, it was just
17 a single sentence. Now, they say: Unlawful use of
18 voter data, et cetera, consists of colon, then they
19 have a 1, and then they have a 2. So part 2 is the
20 internet thing. That's what covers what we were
21 doing. So I would agree that part 2 covers what we
22 are doing. I'd still want to argue, but I don't
23 want to get into it here. I think --

24 THE COURT: But you still want to use this
25 lawsuit in the face of that statute to do what

1 you've done twice before?

2 MR. GREIM: That is true.

3 THE COURT: Now, tell me how I get there.

4 MR. GREIM: Sure.

5 THE COURT: It seems to me that if you
6 can't do it, I don't know how I give you an
7 injunction.

8 MR. GREIM: Well, Your Honor, our
9 vagueness claim under the new statute -- we are not
10 making a vagueness claim under the new statute.
11 That's a better way to put it. That's what you're
12 getting to.

13 THE COURT: Well, maybe. You may be way
14 ahead of me. I'm just trying to figure out what's
15 your winning argument to still get an injunction.

16 MR. GREIM: Just putting aside vagueness
17 and overbreadth, and all that --

18 THE COURT: Well, you can pick it. You
19 can tell me what your winning argument is, how you
20 get an injunction if New Mexico has now made it
21 clear the two things you did in the past, you can't
22 do in the future.

23 MR. GREIM: Right. Well, the injunction
24 would have to rely on this being improper under the
25 MVRA, which is our preemption argument -- we've

1 covered that -- or that under the First Amendment,
2 you can't say: I'll give you access, but I've got a
3 condition; you can't do X with it, which we've
4 agreed -- I want to focus on this -- we've agreed
5 that that X in this case is speech. It's not like
6 the other cases we talked about, Lanphere that this
7 Court cited. We're not saying we're going to go --
8 we want to solicit them to buy a Nordictrack. We
9 want to share it with them so that they, after
10 clicking and agreeing with us that they're going to
11 use it for these purposes, can see whether the
12 Secretary is doing a good job or not. So that's
13 what we want to use it for.

14 And what we're saying is: If New Mexico
15 makes it available, it cannot place that
16 content-based use restriction on us, and not just
17 content-based but a restriction that bans speech
18 that's political, which moves this case ahead of the
19 Sorrell versus IMS case, and ahead of the Lanphere
20 case from the Tenth Circuit, where all they were
21 doing was using information for commercial
22 solicitations.

23 I mean, what's funny is that -- well, I
24 won't go there. I'll stick to your point.

25 THE COURT: Let me ask this: If that's

1 your two avenues: MVRA, preemption, and this First
2 Amendment issue that they cannot condition -- you're
3 basically saying this law is unconstitutional.

4 MR. GREIM: Right.

5 THE COURT: If those are the two big
6 issues -- if those are the two ways that you can get
7 an injunction now, why do we need to decide all
8 these other issues, such as what she did --
9 viewpoint discrimination.

10 MR. GREIM: Because, remember, they're not
11 even giving us access to the data. They're not even
12 giving access to the data. Our proposition is, and
13 has always been, we think that this internet ban is
14 no good, it's unconstitutional.

15 But we have made it very clear we're not
16 going to go do that unless a court tells us we can.
17 And what they're saying is: Well, you've been
18 unclear. We still don't know whether you mean that.
19 Or you did it in the past, and that troubles us.

20 I mean, we've got to get out of that.
21 We've got to get beyond that. That can no longer be
22 a reason to block us from getting this data.

23 So even if the Court wants to take the
24 MVRA position it sketched out here, which we think
25 would be against all the authority, there would

1 still be a viewpoint-discrimination-based reason to
2 say you cannot deny them access when they tell you
3 that they're not going to go publish it on the
4 internet unless they win. And if we don't win on
5 the First Amendment argument here, you know, we'll
6 go up, we'll keep trying. And maybe we'll do this,
7 whatever we have to do.

8 But in the meantime, you can't keep
9 holding our rights hostage. Because everybody else
10 gets it. We promise we're not going to share it or
11 put it online, or whatever you want to say, without
12 an order from the Court saying we can do it. We've
13 always said that. I mean, I say it for the 20th
14 time here today. So we at least need that relief,
15 Your Honor, we at least need it.

16 But I want to mention one more thing,
17 though -- well, you may have more questions on that
18 point for me.

19 THE COURT: I've got more questions, but
20 let me hear what you have to say.

21 MR. GREIM: Okay. I've got to say this on
22 vagueness. I mentioned there were two points, that
23 now they've taken 1-4-5.6 and broken it into two
24 points. And here's what's funny: The very first
25 point that they have, no one has focused on that,

1 but the very first thing they say that you can't do
2 is the knowing and willful selling, loaning,
3 providing access to, or otherwise surrendering of
4 voter data, mailing labels, or special voter list by
5 a person -- and then they go on -- for purposes
6 prohibited by the Election Code. So it's the same
7 language they had before, it's the same setup, where
8 they say: you can't sell, transfer -- it sounds
9 very, very certain -- and then they say "for
10 purposes prohibited." And that's the governmental
11 purpose, election and campaign purpose. So they've
12 got the same structure borrowed again.

13 Remember, they were arguing before that
14 that was enough; that that was enough to tell us
15 that you can't put it on the internet. So isn't it
16 funny that they've got this now in their statute,
17 but they still put in a second piece about the
18 internet. It kind of suggests to you, if the
19 internet part is not surplusage, if they didn't just
20 do a lot of extra drafting, that that first piece in
21 the statute cannot bear the weight they've been
22 putting on it for the past, you know --

23 THE COURT: Well, that's my point about
24 this law had to do something. And I had problems
25 with the Secretary's construction earlier. Boy,

1 there are so many issues in this thing, somebody
2 will have to refresh my memory why -- and I think
3 you agreed with me when you were arguing -- that it
4 didn't matter, for a federal court, whether the
5 legislature made this interpretation or the
6 Secretary of State, for our purposes. Maybe for
7 First Amendment purposes, I assume the Secretary of
8 State, even though I didn't know how she was getting
9 there. Is that still a problem? I mean, it doesn't
10 matter whether we have a new law, whether it's the
11 Secretary of State's interpretation, whether it's
12 faulty or not. For a federal court trying to
13 determine First Amendment, it doesn't really matter
14 how we got there. Is that still the case?

15 MR. GREIM: That's right, Your Honor. I
16 mean, it helps -- as we said in our brief it sort of
17 helps we take out this measure.

18 THE COURT: I think it helps you on the
19 viewpoint discrimination and the content
20 discrimination, because the interpretation is, I
21 think, additional evidence that it was created for
22 you.

23 MR. GREIM: We agree, Your Honor. And in
24 fact, there was evidence that the Secretary of State
25 was lobbying for this -- we have those documents, I

1 think, in the record -- that was pushing for this
2 change.

3 But I'll quickly turn to overbreadth, and
4 then I'll stop, unless you have more questions for
5 me. Overbreadth does heavily cover the same ground
6 as our main First Amendment argument. Sometimes
7 people even just plead those two together in the
8 same count.

9 But I want to focus on this one issue.
10 Let's be very clear what the Secretary's position
11 here is: That every person who wants this data, who
12 want to use it, analyze it, whatever, must come
13 directly to the Secretary of State for that data.
14 They cannot come by that data by engaging in speech
15 with their fellow citizens where the data is shared.
16 That logically follows. Remember, the position
17 here, they've always had is: You can't share
18 outside your organization.

19 THE COURT: But isn't the reason for that
20 is they want your signature on that affidavit?

21 MR. GREIM: Well, that's what they say.

22 THE COURT: Otherwise -- I mean, all this
23 is pretty loosey-goosey enforcement anyway. But if
24 they don't have your signature, they've got none.

25 MR. GREIM: So this is the point, okay?

1 Remember, they give four reasons. They say: One,
2 revenue generation; two, they want you to view the
3 affidavit because the affidavit tells you what you
4 can and can't do, and that serves an education
5 purpose. Now, remember, that the affidavit's
6 changed, though. Remember, the one that Local Labs
7 signed didn't say that you're completely prohibited
8 from transferring it. It said you can't do it for
9 purposes prohibited by the Election Code. So that
10 changed, which is why we question that as a purpose.
11 That was number two.

12 Number three was: We want people to know
13 that not just everybody can get this.

14 THE COURT: I would imagine -- and you can
15 tell me if it's true -- the affidavit has changed
16 again in light of the new statute.

17 MR. GREIM: Well, that's a good question.
18 I don't know that. But it may not have, because
19 remember -- well, we argued the affidavit got out
20 ahead of the statute. So it may be that they don't
21 think they've got to change it again, because the
22 statute finally caught up with the affidavit. I'm
23 not sure.

24 But and then the fourth one was
25 misinformation, combating misinformation, which

1 we've said absolutely that's a content-based
2 restriction. They shouldn't rely on that. In fact,
3 I think we would win if they only used that one.

4 But the third one is what we've heard the
5 most about. But think about this, Your Honor. If
6 the signature on the affidavit is the key thing,
7 they're saying: Well, then we can go prosecute you
8 because you made a false swearing. Or, you know,
9 maybe there would be other elements, like: At the
10 time you swore, you intended to break the law and
11 things like that.

12 But why does New Mexico have to enforce
13 their interest in that way? That's part of the
14 analysis here, too. I mean, why can't they just say
15 it is prohibited to do certain things with the data,
16 and then, if you do it, you get in trouble for that?
17 So why tie it to an affidavit requirement? That's
18 one.

19 The other thing is, if you want to educate
20 people, because while they're signing it, they read
21 what the restrictions are. That's what VRF already
22 does. It makes you agree on the restrictions before
23 you sign. Now, they may say: Well, people don't
24 really read that. I mean, do they really read the
25 affidavit? The point is this: There is no reason

1 to think that the particular method that they use to
2 police right now is the only way to do it right, if
3 these are indeed their interests, if indeed we
4 really think that the voter lists are going to be
5 the means by which all these harms come upon us.
6 Again, there is no evidence of that. But if we
7 thought that, why would we have to use affidavits?

8 Why not tell the Republican Party, say:
9 Guys, you better start keeping a list of everybody
10 who gets access to this data. They don't do that
11 now. And they might say: We're going to conduct an
12 audit every six months and find out who has gotten
13 it. They don't do that. We're going to start to
14 care about whether people make false statements in
15 the affidavit, you know? We're going to finally get
16 around to following up on, you know, how much data
17 I360 has sold, and who has gotten New Mexico data,
18 where in the country. You know, they don't do those
19 things, which is why we should question the state
20 interests. Why are they trying to cut out VRF?
21 It's suspicious, and goes to the overbreadth
22 argument.

23 So I went too far, I went too long again,
24 but I'm open for questions.

25 THE COURT: Let me hear from Ms.

1 Schremmer. I probably will give you the last word
2 on the vagueness, but let me hear what she has to
3 say. Ms. Schremmer.

4 MS. SCHREMMER: Thank you, Your Honor.

5 THE COURT: Ms. Schremmer.

6 MS. SCHREMMER: I think we finally worked
7 around to it with Mr. Greim's most recent argument,
8 which there are only two ways that VRF can succeed
9 in this case. One is to prove the very difficult
10 and very narrow Doctrine of Obstacle Preemption that
11 somehow overrides New Mexico's regulations via the
12 MVRA. And the other is to ask this Court to expand
13 First Amendment Doctrine to say that there is no
14 such thing as a conditional grant of access; that
15 even though the First Amendment doesn't give you any
16 right of access, to the extent the Government
17 voluntarily allows you some information, it can't
18 place any conditions on that. Which is essentially
19 the same thing as the First Amendment gives you a
20 right of access.

21 And both of these ask the Court to be
22 quite expansive with this application of the law,
23 either through Obstacle Preemption or through an
24 innovative reading of the First Amendment.

25 And because neither of them are well

1 supported in the law, we would ask the Court to
2 reject both of them.

3 We've heard quite a lot just now about
4 what the Secretary's individual motivations are or
5 are not. And you know our stance on that and our
6 arguments on that, and what we think the record
7 reflects on that.

8 But the real point is: It doesn't matter,
9 because this is about prospective relief. It is
10 about what we can do going forward.

11 THE COURT: I think you got me probably a
12 lot of the way. But on the fact that the Secretary
13 still refuses to give this organization the
14 documents they're giving to other people, it seems
15 to me that that request is still alive and well and
16 needs to be resolved.

17 MS. SCHREMMER: And in those denials, Your
18 Honor, it did say: We will abide by the outcome of
19 this litigation. So those denials are tied up with
20 there being a live pending dispute that we expect
21 resolution on, and the lack of clarity that --
22 perhaps we got some more clarity and perhaps we can
23 get this worked out about whether VRF would, at some
24 intermediate point before final judgment and final
25 resolution of those issues, go live with New Mexico

1 voter data again.

2 This is not in any way a quote/unquote
3 forever ban on providing VRF information. This is
4 wanting to make sure that New Mexico's
5 regulations --

6 THE COURT: It feels like it's a permanent
7 ban on this one organization. There doesn't seem to
8 be any daylight at the end of the tunnel saying:
9 You're going to get this information. They're
10 always going to believe what they believe, and
11 you're always going to distrust them. But the
12 bottom line is, if they're willing to sign that
13 affidavit like everybody else, arguably it's for the
14 fact finder; you make your arguments that it's
15 conditioned by the letter. They make their
16 arguments that, no, it's not. The fact finder has
17 to determine whether that distinction is one that
18 didn't constitute viewpoint or content
19 discrimination or it does.

20 MS. SCHREMMER: And that may be, but that
21 would only cover the period between now and a final
22 resolution of this case.

23 THE COURT: Well, I'm not sure. I mean,
24 if it's a permanent injunction, then it's ongoing.
25 You've got to give them the information regardless

1 of their beliefs.

2 MS. SCHREMMER: Right. And of course, we
3 will abide by whatever the final ruling of the case
4 is. But in terms of the determination right now to
5 not give data, it's based on the belief and the
6 interpretation of the qualified promise that they
7 won't post, that they would at any intermediate
8 point post the data. And so, for example, the data
9 went live again after this Court's preliminary
10 injunction ruling, even though there was only a very
11 narrow ruling that we could not prosecute the
12 behavior. That was enough for VRF to take the data
13 live.

14 THE COURT: But that was -- in my view,
15 that was totally different, because they didn't get
16 anything with the preliminary injunction. They
17 already had it from Local Labs. That was what went
18 online.

19 But here, we're talking about an
20 injunction that you can't continue to not give them
21 the same materials that you're giving other groups.

22 MS. SCHREMMER: And to us it's not
23 about --

24 THE COURT: That part seems to me to be
25 still alive.

1 MS. SCHREMMER: And to us it's not about
2 their possession of the materials. It's about the
3 posting online. So whether the data was old or new
4 when they put it back on the internet after the
5 preliminary injunction --

6 THE COURT: Just as a triable issue or
7 issue that has to be decided, I think there is
8 something left.

9 MS. SCHREMMER: Well, I think that the
10 resolution of these other issues will fully resolve
11 this issue as well. What we're looking for is to
12 make sure that New Mexico --

13 THE COURT: Well, I'm not -- I mean, yes,
14 if I find viewpoint and content discrimination or if
15 the fact finder does that, then they would be
16 entitled to a PI, or a permanent injunction. And,
17 if there is not viewpoint or content discrimination,
18 they wouldn't be entitled to it.

19 MS. SCHREMMER: But that speaks to the
20 receipt of the data and the possession of the data.
21 And our driving concern is the publication of the
22 data.

23 And so, if we were in the universe right
24 now, where we knew that VRF was going to abide by
25 New Mexico law, which says you cannot post this on

1 the internet, there would not be an issue. But what
2 we have heard today is still that that is what they
3 wish to do with the data, because they believe that
4 law is unconstitutional, and that they're seeking
5 this Court to overturn that law based either on an
6 expanded First Amendment analysis, or on Obstacle
7 Preemption.

8 And so, we are obviously arguing against a
9 facial attack to that law. We don't think there is
10 obstacle preemption. And we don't think there is a
11 First Amendment right to post this data online.

12 And if we are then in a universe where VRF
13 has to abide by that constitutional regulation of
14 New Mexico State data, then the issue of providing
15 them the data evaporates. Because again, it's not
16 their possession of their data, their analysis, or
17 the editorial comment on the data that concerns us.
18 That is not of concern.

19 What is of concern is the posting on the
20 internet of wholesale citizen information.

21 THE COURT: Okay. Thank you, Ms.
22 Schremmer.

23 Mr. Greim, I'll give you the last word on
24 overbreadth, vagueness.

25 MR. GREIM: Your Honor, I don't think I

1 have anything more to say on those two points.

2 Just listening here, though, just to
3 respond to that last argument, I mean, I hope it has
4 been clear, we are not going to post the old data,
5 new data, any data unless we get a judgment saying
6 we can do such a thing. We've said it over and over
7 again. And I feel like we're in some sort of a
8 nightmare where I don't when we'll ever -- I'm
9 afraid the Court is going to have to enter a
10 decision on the viewpoint discrimination piece if it
11 doesn't believe the MVRA applies. Because I don't
12 know how we'll ever get this again.

13 I mean, I'm just going to rely on the
14 materials in the motion. We've quoted what they
15 said at question, when I asked the same questions.
16 And I'm telling you now: We are not going to post
17 it without a court order. And they'd say, well, But
18 you posted it before.

19 And I said, Well, we've got a court order
20 from the judge saying we'd not be in trouble for the
21 old data. And that's all we posted. Well, still
22 wasn't good enough.

23 So, Your Honor, this really doesn't go to
24 overbreadth or vagueness, really goes to viewpoint
25 discrimination. But, I mean, we believe we're

1 entitled to judgment on all the other points as
2 well. But certainly, I mean, we will have spent all
3 this time without a decision on these new points.
4 And we'll never know when we'll get the data again.
5 Maybe we'll have to form a new organization, and
6 have them request. But then they can't share with
7 us. So we're stuck, and we need federal court
8 intervention, and we need a decision from this
9 Court.

10 THE COURT: All right. Thank you, Mr.
11 Greim.

12 Ms. Schremmer, I chopped up your motion.
13 Anything else you want to say on your motion for
14 summary judgment?

15 MS. SCHREMMER: Not unless Your Honor has
16 questions.

17 THE COURT: All right. And I chopped
18 yours up, Mr. Greim. Anything else you want to say
19 on your motion or the State's motion?

20 MR. GREIM: No, Your Honor.

21 THE COURT: Let's talk a little bit about
22 the mechanics here. You can tell I'm hung up on
23 this, but that's because I've got to put out a
24 product for you. So help me out. It seems to me
25 we've kind of shaken down to where there are some

1 real big legal issues I've got to decide. And
2 those, I think I can do in a normal summary judgment
3 way.

4 But I am concerned about using the summary
5 judgment device to determine whether, A, they have
6 conditioned their affidavit in some way.

7 And I'm also concerned about using the
8 summary judgment device to decide whether the
9 Secretary engaged in viewpoint discrimination or
10 content discrimination.

11 Would the parties entertain -- rather than
12 having a trial, that on those issues the Court makes
13 factual findings; that the record here be considered
14 the trial for that, and I make factual findings on
15 it. Or do you want to come back, if I feel like,
16 after I write the opinion, if I'm still
17 uncomfortable with deciding that as a summary
18 judgment issue, asking you to come back for a bench
19 trial? What's your thoughts, Mr. Greim?

20 MR. GREIM: Your Honor, we love the food
21 and the weather on our visits here. But we would
22 really prefer to treat this as if it had been our
23 trial. The Court, remember, under -- I'm going to
24 miss my rule citation -- can use the evidence it
25 already heard from live witness testimony at the PI

1 hearing, much of which is recited here.

2 But we would be willing to stipulate that
3 all of the citations that have been put in these
4 voluminous papers and exhibits, and everything like
5 that, you know, should be treated as the testimony
6 of those witnesses. And objections that are made in
7 the paper are made to you as they would be at trial.
8 But we would strongly prefer that, especially given
9 the extreme cost of just repetitive litigation.

10 THE COURT: What's your thoughts, Ms.
11 Schremmer?

12 MS. SCHREMMER: Your Honor, I need to
13 speak to my client about that. I do see the appeal
14 of it. But to the extent the thing that we're
15 talking about is the Court's feeling that there is
16 some fact dispute or some credibility issue, we may
17 be entitled to put on live witness testimony on
18 those points. Otherwise, they would be ordinary
19 summary judgment findings.

20 I do take Mr. Greim's point, and I would
21 ask the opportunity to talk to my client.

22 THE COURT: Well, think about it. And I'm
23 not advocating it. I'm just trying to figure out a
24 way to be as efficient as possible.

25 Because what I'm afraid of is, even though

1 y'all filed cross-motions for summary judgment, if I
2 go back and really work and put together an opinion,
3 I'll answer some questions for you -- there is no
4 doubt about it -- but it may be unsatisfactory in
5 the sense that I ultimately end up saying there is a
6 factual issue here, and I feel uncomfortable saying
7 there is not a genuine issue of material fact, even
8 though both sides say that. I do think that there
9 is a big factual issue as to whether the affidavit
10 with the letter attached complies with the statute.
11 Because that's the linchpin, I think, of the
12 discrimination that's alleged to have taken place.

13 So somebody has got to make that call.
14 And I'm not sure y'all agree on that. It looks to
15 me like y'all have a disagreement on that.

16 And then the same thing about, you know,
17 then -- even if it is the same response that
18 everybody else is giving, did the Secretary engage
19 in any viewpoint or content discrimination. You're
20 not going to agree to that and they're not going to
21 agree to that.

22 So those are two big issues it seems to me
23 I can work on this, and it will answer some
24 questions, and it will get us down the road. But I
25 think, ultimately, it's not going to resolve the

1 case.

2 So, yeah, go ahead.

3 MR. GREIM: Your Honor, if I could, just
4 to drill down a bit further. I mean, I think you
5 might recall that Ms. Vigil and Ms. Pino testified
6 live to the Court. And we did go back and depose
7 Ms. Vigil as part of a 30(b)(6). And then we
8 deposed Mr. Curtas and Mr. Rockstrum, the computer
9 technician. But on those issues there is no -- I
10 mean, no one is arguing about, you know, one witness
11 contradicting the other or anything like that. We
12 don't have those --

13 THE COURT: Let's say this was a trucking
14 case, and there wasn't a fact at all. We'd still
15 ask that jury to say: Is that negligent? Is that
16 unreasonable? And I guess I'm feeling like this
17 ultimate factual issue I've still got to make the
18 call. And I'm not sure the summary judgment device
19 is the way to do it. I think the way to do it is
20 making a factual finding. That's just my thought.
21 I mean, I hear what you're saying. I mean -- and
22 this happens, you know, everything is undisputed,
23 but somebody has got to make a call, and that's
24 still a factual call. It's not a legal call. It's
25 a factual one. That's my thoughts.

1 MR. GREIM: Your Honor, if we may, if the
2 Court feels that way after -- I know there is going
3 to be a process of lining things up and looking at
4 the testimony, and then deciding whether a
5 reasonable fact finder could come out the other way,
6 applying Rule 56. I mean, I just want to
7 reiterate -- we would be very happy to do this
8 without calling all these people back in here again.

9 THE COURT: Well, and I think y'all can
10 probably agree to some procedure: Say, here's the
11 record. The State may have an interest in calling a
12 few, if they want to go to supplement the record.
13 But I think probably, if everybody wants to at least
14 streamline the trial, y'all can probably figure
15 out -- you've got two boxes of information. You've
16 got the PI record, and now you've got this. You can
17 merge them, or you can pick one over the other or
18 something like that.

19 Ms. Schremmer?

20 MS. SCHREMMER: One of the issues we may
21 have, Your Honor, is that VRF, obviously, deposed
22 our witnesses, but we didn't depose our witnesses,
23 you know, heading toward trial. These were not
24 trial depositions. And so the opportunity to
25 solicit testimony from our own witnesses is the main

1 issue that I'm kind of concerned we'd be losing if
2 we're at a trial sort of determination.

3 THE COURT: I hear what you're saying,
4 you're exactly right. But my impression was you
5 kind of -- you got your sworn testimony out in your
6 motion for summary judgment in one form or another
7 to support your case.

8 MS. SCHREMMER: That's probably true as to
9 most issues. Today has been clarifying in terms of
10 kind of this issue of the qualified promise, and
11 how, you know, we have interpreted it and our
12 client's, on advice of counsel, have interpreted it
13 is obviously different than what we heard on the
14 stand today, and that's probably a conversation that
15 we can have. Because I think today was the least
16 qualified promise that we have heard so far.

17 But that's kind of an issue that concerns
18 me, and that our folks have not had an opportunity
19 to testify about, or be heard about.

20 But, again, I'll talk to my client and
21 talk to Mr. Greim and see what we can maybe figure
22 out. Nobody is interested in wasting time or money,
23 for sure.

24 THE COURT: Well, if the State were to
25 say, you know: Here's the data. We've got enough

1 assurances from you in federal court and with the
2 clarifications, all this has made us comfortable
3 enough to give, what then would really need to be
4 decided here?

5 MR. GREIM: Well, Your Honor, I mean,
6 we --

7 THE COURT: If they start giving you
8 information, doesn't that kind of gut out your PI?
9 I know you've got those legal issues. I can't run
10 away from those. I'm not trying to run away from
11 anything. I'll do what I've got to do. But it
12 would gut your PI, unless I was willing to give you
13 access under the MVRA or find the statute
14 unconstitutional. And those wouldn't require any
15 sort of trial, would they?

16 MR. GREIM: Well, Your Honor, I have --

17 THE COURT: Let's say they sent you a box
18 of documents tonight and said: We're satisfied.
19 You told that federal judge, you know, what you
20 said, and with the letter and stuff, we've got a
21 good position. Here's your box of documents. You
22 can tell how old I am talking about sending boxes of
23 documents. So why, then, would you need -- if this
24 is not a damage action, why would we need to
25 establish that what the Secretary did in the past

1 was viewpoint discrimination or content
2 discrimination?

3 MR. GREIM: Well, Your Honor -- and this
4 is what we call the kind of rope-a-dope situation
5 that often happens in 1983 cases, where you have to
6 pour all this effort in over an extended period of
7 time, and then everybody kind of hears what the
8 court has to say, and then someone says, you know, I
9 only now really understood your position. I'm
10 sorry, this was all just a miscommunication. Here
11 you go.

12 THE COURT: Well, I know. But they also
13 can maybe see the writing on the wall, too, and say:
14 Why are we fighting this? And we've got the
15 assurance that we need.

16 MR. GREIM: So, Your Honor, that's the
17 Voluntary Cessation Doctrine we'd be in at that
18 point. I mean, our view is -- and I think we could
19 cite authority on this -- although, I wasn't really
20 prepared for this today -- that a defendant doesn't
21 get to come in and claim to have seen the light, and
22 they usually say that there is something new they've
23 learned, or something like that, and then avoid all
24 the consequences of having fought the thing the
25 entire way through.

1 THE COURT: But what are the consequences?

2 MR. GREIM: Well, the consequences are our
3 fees, for one thing, under a 1983 claim, which have
4 been substantial. I mean --

5 THE COURT: But there is doctrines on
6 that. If something happens in the middle of a trial
7 and it's a cessation of the allegedly unlawful
8 activity, my memory is you can still make a claim
9 for fees.

10 MR. GREIM: And we might. I mean, that's
11 what I'm getting to. My May letter -- you know,
12 we've heard all these different reasons why it can't
13 be granted, and something I've said today sounds
14 better, but maybe it's not all the way there yet. I
15 have no idea what that could be.

16 THE COURT: Well, Ms. Schremmer is the one
17 to speak to this, but, you know, when you stand up
18 in federal court, and you're a national lawyer, you
19 go all around, and you make a representation, you
20 can kind of take that to the bank.

21 MR. GREIM: Well, Your Honor, I mean, I
22 made that representation in May, and then I used it
23 as an exhibit in front of the Court. Then I argued
24 it again at our stay hearing -- although I wasn't
25 present, you let us go through Zoom. I've been

1 saying it until I'm blue in the face, all through
2 the briefing. I mean, I take all that just as
3 seriously as standing here --

4 THE COURT: Here's the thing that --
5 again, Ms. Schremmer should be making her own
6 arguments instead of me -- but here's the thing, I
7 think, has really changed is the legislature has now
8 prohibited you, and you've agreed that, unless I
9 come up with a First Amendment right to publish this
10 stuff, you know, there is not a possibility of it
11 being published in New Mexico.

12 I'll have to decide those issues. I can't
13 run away from those issues. But I do think that has
14 changed somewhat, perhaps, the calculus of the State
15 in this case.

16 MR. GREIM: Your Honor, I'll say this: In
17 every case -- I mean, you have to say this in front
18 of a judge; right? I mean it -- we are always
19 willing to entertain any sort of an offer. But it
20 can't leave us being in exactly the same position we
21 would have been, had they complied with things a
22 year ago, and we've just incurred all these fees,
23 some of which were incurred on other theories. I
24 mean, that's part of the issue, too.

25 So I think I'll leave it there, Your

1 Honor.

2 THE COURT: Okay. Well, I can't work all
3 this out. That's going to depend -- you know, you
4 may never go away without a PI, and you may never be
5 willing to give them documents. So that I can't --
6 that's just my job. I'll have to decide those
7 issues.

8 The one thing, though, I really need is
9 that MVRA box. You've got to really tell me: Okay,
10 Judge, you're buying our argument, what's in that
11 box. And be exhaustive. Because that's the kind of
12 stuff they may ask for. And, you know, your
13 representations here about this is the universe of
14 stuff we would produce under the MVRA. Unless I'm
15 missing something, they can take that stuff, put it
16 all over the internet. Because once it's produced
17 by the -- under the umbrella of the MVRA, that's
18 just how you go about your work. And I'm putting
19 aside the voter list and things like that. But I'll
20 need that.

21 All right. Well, I will try to get this
22 as soon as possible. Be patient with me. There is
23 a lot of stuff here. But I'll try to start work on
24 it and get it out to you.

25 Obviously, you know, I don't watch the

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1 Tenth Circuit stuff very much. I've got enough
2 problems watching what I have in front of me without
3 watching the cases that have gone up to the Tenth
4 Circuit. Occasionally, I'll get a clerk that is
5 interested in finding out what's happening. But
6 it's not something that I always do. Obviously, if
7 they come out with a big opinion, it will be on
8 CM/ECF, and I'll know it that day. But if there are
9 some developments, you might keep me posted; it
10 might or might not --

11 When is our trial date? I know it got
12 pushed forward. Is it September?

13 MS. SCHREMMER: Yes, Your Honor.

14 THE COURT: Do you want to keep that on
15 and keep my feet to the fire? Yes, that's what the
16 plaintiffs want to do. So I've got a lot of stuff
17 to get out. Is it like September 4th or --

18 MS. SCHREMMER: The 11th.

19 THE COURT: It's the following week. So
20 it's the week after Labor Day. It's going to be
21 tight. It's going to be real tight, given what
22 else -- you know, how it works in federal court. I
23 change clerks that Labor Day weekend. So we've got
24 to get some stuff out of their head on paper in some
25 other cases, and it just may be tough. So think

1 about it. But we'll keep it in place until y'all
2 tell me otherwise. And if need be, I'll -- as I
3 often have to do -- just give you sort of a cheat
4 sheet opinion, telling you: Here's the rulings, and
5 I'll follow it up with an opinion, and then here's
6 the trial. So I think it's probably good to keep it
7 if place.

8 All right. Anything else we need to
9 discuss while we're together? Anything else I can
10 do for you, Mr. Greim?

11 MR. GREIM: No, Your Honor. Thank you for
12 all your time here.

13 THE COURT: Mr. Harrison, you want to
14 enter an appearance? You've been there for a while.
15 Do you want to formally enter an appearance?

16 MR. HARRISON: Yes, Your Honor, Carter
17 Harrison.

18 THE COURT: Mr. Harrison, good morning to
19 you.

20 Anything else from the defendant, Ms.
21 Schremmer?

22 MS. SCHREMMER: No, Your Honor.

23 THE COURT: All right. Appreciate y'all's
24 presentations and hard work. Be safe on your
25 travels. And I'll try to get something out to you

1 as soon as possible.

2 MR. GREIM: Thank you.

3 MS. SCHREMMER: Thank you.

4 (The Court was adjourned.)

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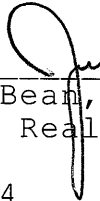
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UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages
constitute a true transcript of proceedings had
before the said Court, held in the District of New
Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my
hand on July 14, 2023.



Jennifer Bean, FAPR, RMR-RDR-CCR
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